86 1382

No.

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

GERALD SAJER, BRIGADIER GENERAL (PA),
THE ADJUTANT GENERAL, COMMONWEALTH OF
PENNSYLVANIA, et al.,

Petitioners

v.

ULUS JORDEN, JR.,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

By: THOMAS M. CROWLEY
Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Senior Deputy Attorney General

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Chief, Litigation Section

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a member of the National Guard may maintain an action for injunctive relief against his military superiors to challenge disciplinary action taken against him based on his refusal to obey a facially valid military order.

2. Whether the Court of Appeals' decision allowing such suits for injunctive relief by military personnel conflicts with decisions of other Courts of Appeals.

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PARTIES TO THE PROCEEDING

Petitioners are Brigadier General Gerald Sajer[1] the Adjutant General of the Commonwealth of Pennsylvania, Colonel John D. Campbell and Major Henry C. Frisby, officers in the Pennsylvania Air National Guard, and respondent's former commanding officers.

Respondent is Ulus Jorden, Jr.

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[1]Brigadier General Sajer has replaced Major General Richard M. Scott as the Adjutant General of Pennsylvania. Because Maj. Gen. Scott was sued only in his official capacity, he has automatically been substituted for by Brig. Gen. Sajer. Rule 40.3, Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals is reported at 799 F.2d 99 (3d Cir. 1986) and a copy may be found in the appendix at 22a - 102a. The opinion of the District Court is not reported, but is reproduced in the appendix at 103a. - 124a.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying rehearing was issued on October 23, 1986. A motion for extension of time to file this petition was granted on January 13, 1987, extending the time to file this petition until February 20, 1987. This petition for writ of certiorari has been filed within this time. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Cost. amend. I

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1

STATUTES INVOLVED

The Civil Rights Act of 1871, c.22, §1 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

The Civil Rights Act of 1871, c.22, §2 provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose

of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threats, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the

> party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1985(3).

The Civil Rights Act of 1871, c.22, §6, provides as follows:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect,

> the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. §1986.

STATEMENT OF THE CASE

1. Respondent, Ulus Jorden, Jr., brought this action under the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985(3) and 1986, alleging that he was unlawfully discharged from his military and civilian positions in the Pennsylvania Air National Guard ("PaANG") in retaliation for the exercise of his rights under the First and Fourteenth Amendments to the United States Constitution. Pet. App. 103a. Named as defendants were Major General Richard M. Scott, the Adjutant General of Pennsylvania, and Jorden's superior officers, Colonel John D. Campbell and Major Henry C. Frisby.[2] Jorden sought

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[2]Maj. Gen. Scott has been succeeded as Adjutant General by Brig. Gen. Gerald Sajer. Also named as defendants

(FOOTNOTE CONTINUED ON NEXT PAGE)

both declaratory and injunctive relief, as well as an award of damages, and reinstatement in the PaANG, and to his employment as a civilian technician. Pet. App. 33a-34a. The District Court, relying on this Court's decisions in Chappell v. Wallace, 462 U.S. 296 (1983) and Tennessee v. Dunlap, 426 U.S. 312 (1976), granted defendants' motion to dismiss. Pet. App. 109a-114a.

On appeal, a panel of the Court of Appeals for the Third Circuit affirmed in part and reversed in part. Pet. App. 24a. The Court of Appeals affirmed

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(FOOTNOTE CONTINUED)

were the National Guard Bureau and its Chief at that time, Major General Emmett H. Walker. These defendants are separately represented.

the dismissal of Jorden's damages claim, but reversed the dismissal of his injunctive claim seeking reinstatement. Id.[3] The Court of Appeals held that Chappell leaves open claims for injunctive relief, and that permitting injunctive relief while denying a damages remedy "is supported by considerations of policy." Pet. App. 7la.

2. In 1956, respondent Jorden joined the PaANG, and two years later he became a full-time civilian technician in PaANG as well. Pet. App. 3la. Jorden's service with the PaANG proceeded without incident until October, 1981, when Jorden began filing a series of complaints about activities at the Willow

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[3]Judge Gibbons would have reversed the District Court not just on the claim for injunctive relief, but on the damages claim as well.

Grove Naval Air Station where he was stationed. Pet. App. 107a. Jorden's complaints, which were directed to his superiors, alleged that Guard funds were being misappropriated and that Jorden, a black, was being discriminated against. Pet. App. 31a.

Jorden claimed that his charges, though legitimate, were ignored, and that as a result of his making them, his superiors began a campaign of harassment against him. According to Jorden, this campaign culminated on October 3, 1984 when Maj. Gen. Scott, in his capacity as Adjutant General of Pennsylvania, issued Special Order AA-472. Pet. App. 107a. That order relieved Jorden from his assignment with the Combat and Support Squadron at Willow Grove and honorably discharged him from the PaANG. The effect of the order was to terminate Jorden's military enlistment in the

National Guard and to withdraw his recognition as a fulltime federal civilian technician employee. Because Jorden's military enlistment was terminated, his civilian technician employment was also terminated, pursuant to 32 U.S.C. §709(e)(1), on November 9, 1984. Pet. App. 32a, 108a.

The October 3, 1984 Order was based on Jorden's refusal to comply with a July 13, 1984 order, issued at the direction of petitioner Campbell, which ordered Jorden to 23 days active duty at the Malcolm Grow Medical Center at Andrews Air Force Base. The order specified that during the 23-day period, Jorden was to undergo psychiatric evaluation. Pet. App. 32a. Jorden admits that he disobeyed the order, but claims that his disobedience was proper because the order was improperly issued. Id.

3. Jorden filed his civil rights complaint in February, 1985, alleging that his superiors had conspired to harass him and to discharge him on the basis of race and in retaliation for the exercise of his First Amendment rights. Jorden claimed that petitioners' actions gave rise to causes of action for violation of his due process rights under the Fourteenth Amendment; for violations of free speech guarantees under the First Amendment; and causes of action under 42 U.S.C. §§1983, 1985(3) and 1986. Pet. App. 103a.[4]

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[4]Jorden also filed two, internal "EEO" complaints, as well as an "Application for the Correction of Military or Naval Record" under the provisions of 10 U.S.C. §1552. Jorden's petition before the Air Force Board for the Correction of Military Records is still pending. Pet. App. 36a.

General Scott, and petitioners Campbell and Frisby filed a motion to dismiss Jorden's complaint under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, arguing that Chappell v. Wallace, 462 U.S. 296 (1983) and Tennessee v. Dunlap, 426 U.S. 312 (1976) mandated dismissal. Jorden's failure to exhaust available administrative remedies was also cited as a basis for dismissal. On September 24, 1985, the District Court granted petitioners' motion to dismiss. The court held that Chappell, supra, controlled this case, and that Jorden's attempt to characterize the military action taken against him as a subterfuge to dismiss him as a civilian employee was precisely the argument rejected in Tennessee v. Dunlap, supra. Thus, Jorden could not maintain a Bivens-type action against his military

superiors. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The court also held that Jorden could not maintain actions under 42 U.S.C. §§1983, 1985(3) and 1986, and that his failure to exhaust administrative remedies was an alternate basis for dismissal.

4. Jorden appealed to the Court of Appeals for the Third Circuit. On August 27, 1986, a divided panel of the Court of Appeals affirmed the District Court's dismissal of Jorden's damages action, but reversed the District Court's dismissal of his claim for injunctive relief seeking reinstatement in the Guard. Jorden v. National Guard Bureau, 799 F.2d 99, 103-111 (3d Cir. 1986); Pet. App. 24a. The dissent would

have reversed the District Court's dismissal of the damages claim as well. 799 F.2d at 111-115 (Gibbons, J., dissenting); Pet. App. 84a.

The panel majority affirmed the dismissal of Jorden's damages claim. Following the majority of the circuits, the panel majority held that Chappell "[laid] down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a fact-specific inquiry." Pet. App. 63a.

As to Jorden's claims for reinstatement, however, the Court of Appeals reversed the District Court. Relying on the absence in Chappell of any direct reference to claims for injunctive relief, and several cases of this Court "as examples of suits against the

military that remain viable,"[5] Pet. App. 68a-69a, the Court of Appeals held that "Chappell neither required nor forbade the district court from dismissing Jorden's claims for reinstatement . . . . [T]he law of this circuit, supported by considerations of policy, dictates that these claims should not have been dismissed." Pet. App. 81a, (footnote omitted). The policy considerations relied upon were that while "[t]he threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking . . . the possibility that an officer may be compelled by a court

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[5]Goldman v. Weinberger, No. 84-1097 (March 25, 1986); Rostker v. Goldberg, 453 U.S. 57 (1981); Brown v. Glines, 444 U.S. 648 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

to cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking." Pet. App. 75a-76a.

Respondent filed a petition for rehearing which was denied on October 23, 1986. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION WHICH ALLOWS MEMBERS OF THE NATIONAL GUARD TO ENJOIN THEIR MILITARY SUPERIORS FROM TAKING DISCIPLINARY ACTIONS AGAINST THEM, INVOLVES IMPORTANT ISSUES OF FEDERAL LAW AND MILITARY POLICY, AND IS INCONSISTENT WITH DECISIONS OF THIS COURT.

a. The decision of the Court of Appeals allows respondent, a member of the National Guard, to seek to enjoin his military superiors from taking disciplinary action against him for failing to obey a facially valid military order. This result is wrong both as a matter of policy and law.

Despite the complexities of the "hybrid status" Pet. App. 27a, of the National Guard, the facts crucial to this case and the issues it presents are abundantly clear. Respondent Jorden was

a uniformed member of the Pennsylvania Air National Guard, holding the rank of Master Sergeant. Pet. App. 33a; Amended Complaint ¶6. His military supervisors ordered him to 23 days of active military service to ascertain his psychological fitness. Respondent disobeyed that order, claiming that his superiors had no authority to issue it. Respondent was honorably discharged from the National Guard, and having lost his military status, was dismissed from his civilian employment.

Respondent does not deny that the order was a military order, issued by military superiors, and that he refused to obey it. Nor does respondent challenge the regulations pursuant to which the order was given. He claims, rather, that the personnel actions taken against him, of which the order was only

one, were part of a scheme of harrasment and racial discrimination. The Court of Appeals held that so long as the relief sought under such a claim is reinstatement rather than money damages, a suit against military supervisors under §1983 is permitted.

At a minimum, and by its own admission, the Court of Appeals has decided an issue of great importance to the federal military and the National Guard of every state which this Court has yet to expressly address: the availability of injunctive relief against the military in suits by military personnel. Petitioners submit that this case squarely presents this issue, which will surely recur, in a posture which will allow this Court to render a definitive statement on it.

More significant is the Court of Appeals' rationale, a rationale which is inconsistent both internally and when read against this Court's decisions. The underlying reasoning of the majority --that there exists a meaningful and legally defensible distinction between suits for damages and suits for injunctive relief in the military context--is plainly erroneous. The basis for this distinction is the unsupported assumption that damage awards present a threat to uninhibited decisionmaking by military officers but injunctions do not. In fact, the intrusion of the courts into military discipline through the grant of injunctive relief, particularly the granting of temporary restraining orders or preliminary injunctions, is

more of a threat to uninhibited decision-making than a post-decision damage award. The Court of Appeals fails to provide any guidance on this issue, presumably allowing any action so long as only injunctive relief is requested. Moreover, regardless of whether damages or injunctive relief is sought, the trial of these claims must of necessity involve both a challenge to military orders and an inquiry into the motivations behind them. Any distinction based on the relief sought rather than on the nature of the lawsuit is, simply, a distinction without a legally significant difference.

b. Once it is understood that what respondent seeks to challenge in his suit for reinstatement are the orders he was given and the motivations

behind them, the conflict between the decision of the Court of Appeals and the decisions of this Court becomes apparent.

Most recently, in United States v. Shearer, No. 84-194 (June 27, 1985), this Court succinctly stated that it is the nature of the case which determines whether the suit can be maintained. The key question is

> whether this suit requires the civilian court to second-guess military decisions, see Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673 (1977), and whether the suit might impair essential military discipline, see Chappell v. Wallace, 462 U.S. 296, 300, 304 (1983).

Slip. op. at 6. As in Shearer, which was a suit by the administratrix of the estate of a deceased serviceman claiming that military supervisors failed to properly supervise the serviceman who killed him,

Respondent's complaint strikes at the core of these concerns . . . [The] allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman. . . . the claim here would require Army officers "to testify in court as to each other's decisions and actions." Stencel Aero Engineering Corp. v. United States, supra, at 673. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in Chappell v. Wallace, such "complex, subtle, and professional decisions as to the composition, training, . . . and control of a military

> force are essentially professional military judgments.' 462 U.S., at 302, quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

Shearer, slip op. at 5-6 (footnote omitted)(emphasis added). Plainly, these concerns are present in this case, where respondent seeks judicial review of the decision to discharge him for his failure to obey a direct, facially valid military order.[6]

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[6]Respondent's attempt to characterize this case as a civilian, rather than a military, matter is not only an attempt to deny the obvious, but is also an attempt to circumvent Tennessee v. Dunlap, 426 U.S. 312 (1976). In that case, this Court rejected a "subterfuge" argument similar to respondent's. And in Shearer, this Court rejected respondent's argument that the case was only a challenge to "'a straightforward personnel decision' . . . By whatever name it is called, it is a decision of command." Shearer, slip op. at 6 (citation omitted).

Quite simply, the decision of the Court of Appeals cannot be reconciled with either the specific holdings or overall intent of this Court's cases. Allowing suits for injunctive relief against military superiors for such straightforward disciplinary actions as are present in this case is contrary to the holding in Shearer. It is also incompatible with this Court's cases beginning in Feres v. United States, 340 U.S. 135 (1950), with its recognition of the adverse effects on military discipline by the maintenance of suits by soldiers against their superiors, and continuing on to Chappell, supra, relied upon by the District Court and cited with approval in Shearer. See also Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977); Orloff v. Willoughby, 345 U.S. 83 (1953).

The cases relied on by the Court of Appeals, see n. 5, supra, are not to the contrary. All involved constitutional challenges to military regulations. (Goldman and Brown under the First Amendment, Rostker and Frontiero under the Fourteenth Amendment. Parker involved a "void for vagueness" challenge to provisions of the Code of Military Justice). None of these cases involved the specific issue presented here: a challenge to a discrete disciplinary action of military superiors in the absence of any general challenge to military regulations. Moreover, the fact that this court has decided constitutional claims brought by members of the military is not dispositive of this issue. The issue of non-reviewability of claims for injunctive relief apparently was not raised in

these cases. Additionally, these cases plainly do not endorse the standardless position of the Court of Appeals, which would allow any claim for injunctive relief merely because an injunction is sought. See., e.g., Goldman, supra, slip op. at 4-5, citing with approval Chappell, 462 U.S. at 300 ("to accomplish its mission the military must foster instinctive obedience") and Rostker, 453 U.S. at 70 (judicial deference is at its apogee when actions involving rules and regulations for governance of armed forces are challenged).

This Court should grant the writ to correct this error and to rule definitively on this issue.

2. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision of the Court of Appeals allowing suits by military personnel for injunctive relief against their superiors is directly in conflict with a decision of another court of appeals, and implicitly in conflict with others. In Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986), the court refused to allow claims for injuctive relief for reinstatement in the TARNG. The court stated:

> Appellants finally contend before this court that they are entitled to injunctive relief in the nature of reinstatement to TARNG. No case following in the wake of Chappell has so held, although one court has

enjoined the enforcement of a military off-limits regulation that infringed on the claimants' first amendment rights. See Ogden v. United States, 758 F.2d 1168, 1184-85 (7th Cir. 1985). In Ogden, however, the Seventh Circuit persuasively threw itself within the net of earlier Supreme Court decisions expressly approved in Chappell, none of which involved direct interference with military personnel decisions. Id. at 1175-76. See Chappell, 462 U.S. at 304-05, 103 S.Ct. at 2367, 76 L.Ed.2d at 593 . . . The common characteristic of these decisions is that they involve challenges to the facial validity of military regulations and were not tied to discrete personnel matters. The nature of the lawsuits, rather that the relief sought, rendered them justiciable. The injunctive relief exception to Chappell advocated by appellants could swallow Chappell's rule of deference.

794 F.2d at 1036 (emphasis added). The conflict with both the result reached and the reasoning employed by the Court of Appeals below is obvious.[7] This clear conflict can be resolved, and the Court can harmonize the lower courts' decisions on the availability of injunctive relief, by granting this petition for writ of certiorari and reaffirming its longstanding holdings in this area.[8]

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[7]The decision of the Third Circuit is also arguably in conflict with Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984) cert. denied, No. 84-1415 (June 3, 1985)(affirming district court in grant of summary judgment for military defendants on claims which included a prayer for reinstatement).

[8]This Court recently granted certiorari in United States v. Stanley, No. 86-393, cert. granted December 8, 1986, which raises the issue of whether a serviceman may pursue an action against

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

his military superiors for alleged constitutional violations arising from his participation in an official Army drug experimentation program. 55 U.S.L.W. 3319. Stanley does not involve claims for injunctive relief, but only damages claims which, moreover, arose in a context where the "demands of military discipline and obedience to orders" were not implicated." Stanley v. United States, 786 F.2d 1490, 1496 (11th Cir. 1986). The related issues presented in this case are not controlled by Stanley, and should be reviewed in order to attain a coherent reading of the doctrine in this area.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Third Circuit and, upon review, the decision should be reversed and judgment entered for petitioners on the claims for injunctive relief.

Respectfully submitted,

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(717) 783-1471

DATE: February 20, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1664

JORDEN, JR., ULUS,

Appellant

v.

NATIONAL GUARD BUREAU
Departments of the Army and The Air Force

and

SCOTT, RICHARD M., Major General (PA)
The Adjutant General Commonwealth of
Pennsylvania

and
CAMPBELL, JOHN D., individually and as
Colonel, Pennsylvania Air National Guard
Base Detachment Commander

and
FRISBY, HENRY C., individually and as
Major, Pennsylvania Air National Guard
Chief, Administration

Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPELTON, MANSMANN, Circuit Judges

The petition for rehearing filed by Ulus Jorden, Jr., appellant in the above entitled case, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having voted for rehearing, and a

majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED. Judge Gibbons would grant the petition for rehearing.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: Oct. 23, 1986

October 10, 1986

ORDER
MOTION GRANTED with
filing as of the date of this order.

For the Court,
/s/ Sally Mrvos
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1664

ULUS JORDEN, JR.,

Plaintiff - Appellant,

v.

NATIONAL GUARD BUREAU;
EMMET H. WALKER, JR., Chief,
National Guard Bureau;
RICHARD M. SCOTT, The Adjutant
General, Commonwealth of
Pennsylvania; JOHN D. CAMPBELL,
individually and as Colonel,
Pennsylvania Air National
Guard, Base Detachment
Commander; and HENRY C. FRISBY,
individually and as Major,
Pennsylvania Air National
Guard, Chief of Administration,

Defendant - Appellees

APPELLANT'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Appellant in the above-captioned appeal, Ulus Jorden, Jr., by his undersigned counsel, hereby moves this Honorable Court for an order granting leave to file a Petition for Rehearing Out of Time, and in support hereof represents the following:

1. On August 27, 1986 this Court entered its Judgment in the above-captioned appeal, which appeal was argued on June 3, 1986 before the Honorable Judges Gibbons, Becker and Stapleton.

2. With the Honorable Judge Gibbons concurring in part and

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1664

ULUS JORDEN, JR.,

Plaintiff - Appellant,

v.

NATIONAL GUARD BUREAU; EMMET H. WALKER, JR., Chief, National Guard Bureau; RICHARD M. SCOTT, The Adjutant General, Commonwealth of Pennsylvania; JOHN D. CAMPBELL, individually and as Colonel, Pennsylvania Air National Guard, Base Detachment Commander; and HENRY C. FRISBY, individually and as Major, Pennsylvania Air National Guard, Chief of Administration,

Defendant - Appellees

APPELLANT'S MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Appellant in the above-captioned appeal, Ulus Jorden, Jr., by his undersigned counsel, hereby moves this Honorable Court for an order granting leave to file a Petition for Rehearing Out of Time, and in support hereof represents the following:

1. On August 27, 1986 this Court entered its Judgment in the above-captioned appeal, which appeal was argued on June 3, 1986 before the Honorable Judges Gibbons, Becker and Stapleton.

2. With the Honorable Judge Gibbons concurring in part and dissenting in part, the Opinion of the Court, as expressed by the panel, is that the September 24, 1985 order of the

U.S. District Court for the Eastern District of Pennsylvania (J. McGlynn) granting motions to dismiss all counts of the Complaint under Fed. R. Civ. P. 12(b) is to be affirmed in part and reversed in part and remanded for further proceedings.

3. The judgment of the District Court was reversed insofar as it dismissed appellant's claims for injunctive relief against the individual appellees, including his claim for reinstatement to his position as a civilian technician in the Pennsylvania Air National Guard.

4. However, the judgment of the District Court was affirmed insofar as it dismissed appellant's claims for

damages.* The Honorable Judge Gibbons dissented on this point alone.

5. On September 11, 1986 appellant filed a Petition for Rehearing and supporting Memorandum of Law on the issue of damages only. The issue raised in said Petition is one of exceptional importance, to wit whether the U.S. Supreme Court's opinion in Chappell v. Wallace, 462 U.S. 296 (1983) requires the federal courts to grant immunity to state national guard officers from damage claims in actions brought under 42 U.S.C. § 1983 by national guard civilian technician employees.

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*The judgment was also affirmed insofar as it dismissed the claims against the National Guard Bureau, a federal agency. No review or rehearing with respect to that decision is being sought.

6. By letter dated September 15, 1986 the Clerk of the Court informed counsel that the last day to file the Petition for Rehearing was September 10, 1986 and that accordingly said Petition would not be entertained by the Court unless leave is granted to file the Petition out of time. A copy of the letter is attached hereto as Exhibit "A."

7. The filing of the Petition for Rehearing one (1) day after the filing deadline is attributable to two (2) reasons, to wit:

(a). the undersigned counsel was away from the office on vacation until September 4, 1986 and thus had no knowledge of the Court's decision until that date; and

(b). in counting the fourteen (14) calendar days within which the Petition was to be filed the undersigned counsel unfortunately (but admittedly inexcusably) forgot to count the date of August 31.

8. Petitioner requests the understanding and indulgence of the Court, and respectfully suggests that the issue raised in the Petition for Rehearing is too important to turn aside simply because appellant's attorney filed the Petition 12 or 13 hours too late.

9. Petitioner also requests that the following factors be considered:

(a). no harm or prejudice to the other parties is occasioned by the late filing in the instant case particularly in view of the fact that under the

Rules no Answer to the Petition may be filed unless specifically requested by the Court;

(b). the extent of the lateness (one day) and the above-asserted reasons are not such as would suggest abuse of or inattention to the Rules of this Court; and

(c). the Rule governing petitions for rehearing imposes a filing time obligation which runs from the date of entry of the judgment rather than service thereof, thus giving the petitioning party less than 14 days to study the opinion; research the issues; write a Petition and Memorandum; and duplicate, bind and file the Petition.

10. Finally, the Court is reminded that the issue with respect to which rehearing is sought involves much more than a dispute between the parties

themselves. The issue affects a substantial number of people in the Commonwealth of Pennsylvania. The Court's decision represents the first time that the Third Circuit has stated that national guard civilian technician employees cannot recover damages for violations of their constitutional rights suffered at the hands of state officers although those officers may act under color of state law. That isolated issue was not adequately briefed or argued. Also, there is some variance on this issue among the circuits. Consequently the issue is one which is likely to be reviewed at some point by the U.S. Supreme Court. The majority and dissenting opinions of the panel are well written and reasoned, carefully thought

out, and extremely well researched. It would indeed be unfortunate if the full Court does not have an opportunity to examine this issue solely because the Petition for Rehearing was filed one day late.

WHEREFORE, movant prays this Honorable Court to grant this Motion for Leave to File Petition for Rehearing Out of Time.

Respectfully submitted,

/s/ FRANK FINCH, III
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September 24, 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1664

ULUS JORDEN, JR.,

Plaintiff - Appellant,

v.

NATIONAL GUARD BUREAU; EMMET H. WALKER, JR., Chief, National Guard Bureau; RICHARD M. SCOTT, The Adjutant General, Commonwealth of Pennsylvania; JOHN D. CAMPBELL, individually and as Colonel, Pennsylvania Air National Guard, Base Detachment Commander; and HENRY C. FRISBY, individually and as Major, Pennsylvania Air National Guard, Chief of Administration,

Defendant - Appellees

APPELLANT'S PETITION FOR REHEARING
UNDER FRAP 40

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

Appellant in the above-captioned appeal, Ulus Jorden, Jr., hereby petitions this Honorable Court for a rehearing in banc on the issue of damages only, and in support thereof represents the following:

1. On August 27, 1986 this Court entered its judgment in the above-captioned appeal, which appeal was argued on June 3, 1986 before the Honorable Judges Gibbons, Becker and Stapleton.

2. With the Honorable Judge Gibbons concurring in part and dissenting in part, the Opinion of the Court, as expressed by the panel, is that the September 24, 1985 order of the U.S. District Court for the Eastern District of Pennsylvania (J. McGlynn) granting motions to dismiss all counts

of the Complaint under Fed. R. Civ. P. 12(b) is to be affirmed in part and reversed in part and remanded for further proceedings. A copy of the Opinion of the Court is attached hereto.

3. The judgment of the District Court was reversed insofar as it dismissed appellant's claims for injunctive relief against the individual appellees, including his claim for reinstatement to his position as s civilian technician in the Pennsylvania Air National Guard (hereinafter PaANG). On remand the issue is to be whether the plaintiff can prove that his dismissal from the PaANG violated his constitutional rights, thus entitling him to reinstatement. The Honorable Judge Gibbons concurred in this aspect of the panel's decision.

4. However, the judgment of the District Court was affirmed insofar as it dismissed appellant's claims for damages.[1] The Honorable Judge Gibbons dissented on this point alone.

5. Petitioner hereby respectfully moves for rehearing in banc limited to the issue of damages.

6. Petitioner and the undersigned counsel of record, having reviewed the Opinion of the Court, believe that this matter involves a question of exceptional importance, to wit whether the U.S. Supreme Court's opinion in Chappell v. Wallace, 462 U.S. 296 (1983) requires the federal

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[1]The judgment was also affirmed insofar as it dismissed the claims against the National Guard Bureau, a federal agency. No review or rehearing with respect to that decision is being sought herein.

courts to grant immunity to state national guard officers from damage claims in actions brought under 42 U.S.C. § 1983 by national guard civilian technician employees.

7. Petitioner further asserts that the result of this decision is that for the first time the Third Circuit has stated that national guard civilian employees cannot, at least in this Circuit, recover damages for violations of their constitutional rights suffered at the hands of state officers despite the fact that those officers may act under color of state law.

8. The crucial inquiry on the issue with respect to which rehearing is sought is that which begins at page 17 and ends at page 20 of the majority opinion (ie. Part C). Petitioner believes that the Court failed to

appropriately address the issue of whether Chappell, supra., is at all applicable to the claims of state national guard civilian technicians

9. Petitioner also asserts that the issue of damages, as a separated and isolated issue, was not adequately briefed before the panel, and that there was never any suggestion during oral argument that any member of the panel entertained serious doubts about whether damages would be available should the Court reverse the District Court's dismissal of the § 1983 action. It is respectfully suggested that the panel might have requested supplemental briefs on the issue of damages alone to enable additional input of the parties on this, a specific point not briefed or argued in detail.

10. Finally, the issue raised herein is one with respect to which, as the Opinion of the Court points out, there is some variance among the circuits. The issue is also one which is likely to be reviewed at some point by the U.S. Supreme Court. Accordingly petitioner believes that a review and further statement by the full Court is appropriate.

WHEREFORE, petitioner prays this Honorable Court to grant this Petition for Rehearing and to schedule reargument before the Court in banc.

[A Memorandum of Law is attached hereto]

/s/ FRANK FINCH, III
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September 11, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1664

ULUS JORDEN, JR.,

Appellant

v.

NATIONAL GUARD BUREAU, Department of the Army and the Air Force: EMMETT H. WALKER, JR., Chief, National Guard Bureau; RICHARD M. SCOTT, Major General (PA), The Adjutant General, Commomwealth of Pennsylvania; JOHN D. CAMPBELL, individually and as Colonel, Pennsylvania Air National Guard Base Detachment Commander; and HENRY C. FRISBY, individually and as Major, Pennsylvania Air National Guard Chief, Administration,

Appellees

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 85-0670)

Argued June 3, 1986

Before: GIBBONS, BECKER, and STAPELTON,
Circuit Judges

(Filed August 27, 1986)

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OPINION OF THE COURT

BECKER, Circuit Judge

This case requires us to determine the susceptibility of National Guard officers to suits by guardsmen for damages and injunctive relief. Plaintiff, Ulus Jorden, discharged from both his military and civilian positions in the Pennsylvania Air National Guard ("PaANG"), sought damages against his superiors and reinstatement to both positions. Relying on Chappell v. Wallace, 462 U.S. 296 (1983), the district court dismissed plaintiff's case under Fed.R.Civ.P. 12(B).

Although we find that the district court acted correctly in dismissing Jorden's claims for damages, we conclude that it erred in dismissing his claims for injunctive relief, i.e., reinstatement. Accordingly, we shall affirm in part and reverse in part and remand this case for further proceedings.

Part I of this opinion sets forth the necessary background - the structure of the National Guard and the facts and procedural history of this case. Part II begins with a brief history of the case law concerning the immunity of military officers from damages claims, and then applies that body of law to the instant case. Similarly, Part III begins with a brief history of the case law concerning the reviewability of claims for injunctive relief against the military, and then considers its applicability to Jorden's claims for reinstatement.[1]

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[1]It is useful at the outset to distinguish among several terms that arise in cases involving the military. First, courts usually invoke the term "immunity" to refer only to whether particular defendants are susceptible to

(FOOTNOTE CONTINUED ON NEXT PAGE)

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or are free from damages actions, while using "reviewability" to refer more generally to the appropriateness of a civilian court hearing cases that involve military matters. See Wallace v. Chappell, 661 F.2d 729, 734 (9th Cir. 1981), rev'd on other grounds, 462 U.S. 296 (1983). We shall follow this path (notwithstanding the fact that the term "immunity" could be understood more broadly to apply to claims for both damages and injunctive relief). Thus, in Part Two, which concerns Jorden's damages claims, we use the term "immunity," while in part three, which concerns his claims for reinstatement, we use "reviewability." to denote generally the propriety of a court's hearing a particular claim. Dillard v. Brown, 652 F.2d 316, 322 n.4 (3d Cir. 1981). Because "justiciability" has a more specific meaning in other contexts, we use "reviewability." As the foregoing suggests, the nomenclature in this area is flexible, and while our choice of terms may seem arbitrary, it is designed to minimize confusion.

I. Background

A. Structure of the National Guard

As this court noted recently in Johnson v. Orr, 780 F.2d 386, 388 (3d Cir. 1986), the National Guard has an "unusual 'hybrid' status as an agency with both federal and state characteristics." The Guard is the modern successor to the state militia, see Engblom v. Carey, 522 F.Supp. 57, 65 (S.D.N.Y. 1981), and all fifty states and Puerto Rico have their own Guard. Article I, Section 8, clause 16 of the Constitution places the power of appointing personnel to the state militia in the hands of the state. Guard members are called out for roughly two weeks a year of military training. In addition, governors may call out their state Guard at any time

for state emergencies such as riots and floods. However, there is a federal component to the Guard as well. The National Guard Bureau, an adjunct of the United States Departments of the Army and Air Force, gives Guard personnel federal recognition as part of either the Army National Guard of the United States or the Air National Guard of the United States ("ANGUS"). In addition, the President may call the Guard into national service, 10 U.S.C. § 3495 (1982).

The Guard's status is further complicated by its having a mixture of military and civilian elements. In addition to its military complement, the Guard hires full-time civilian technicians. The technician program provides various services critical to the Guard's

mission: maintenance of equipment and facilities, support of aircraft operations, and clerical functions. The technician program too involves federal and state elements. Although the 1968 National Guard Technicians Act, 32 U.S.C. § 709 (1982), made civilian technicians federal employees, the technician program is administered at the state level.[2]

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[2]Thus, in Johnson v. Orr, 780 F.2d 38€ (3d Cir. 1986), we held that the New Jersey Adjutant General and technician supervisory personnel acted under the color of state law for the purpose of 42 U.S.C. § 1983 in dismissing Guard technicians. That case involved a certified question concerning the "color of state law" issue. Although amici contended that defendants were immune from a damages suit by virtue of their military status, we declined to reach that issue because it was not part of the question certified by the district court. Id. at 389 n.6. The district court had held that, because the case arose almost entirely in a civilian context, the doctrine of military immunity was inapplicable.

The adjutant general, a state officer, is in charge of personnel matters. Finally, and significant in this case, in order to be eligible for a technician position, one must be a Guard military member. 32 U.S.C. § 709(b). A Guard technician is automatically dismissed from his civilian technician position if he loses his military membership. 32 U.S.C. § 709(e)(6), and can otherwise be dismissed "for cause." 32 U.S.C. § 709(e)(3).

B. Facts and Procedural History

In 1956 plaintiff-appellant Jorden became the first black member to enlist in PaANG. Two years later he became a full-time civilian technician in PaANG as well. For the next twenty-five years he served in both capacities without incident. Beginning in 1981, however, Jorden became either a "whistleblower" or a "troublemaker," depending on whom one believes. He launched a series of protests alleging various abuses by his superiors, including impermissible expenditure of Guard funds and discriminatory treatment of him personally.

Jorden alleges that his complaints were legitimate, that they were not followed up adequately, and that instead they led to a campaign of

harrassment against him. In October, 1984, he was called alone (without his unit), in an Order of the Governor, to active duty for twenty-three days of "special training." The order specified that, during the twenty-three day period, Jorden was to report to the Malcolm Grow Medical Center for psychiatric evaluation.

Jorden refused to comply, believing that the governor was not empowered to call out a single guardsman for such a special session. Following Jorden's non-compliance, PaANG Adjutant General Richard M. Scott dismissed him from his military position in PaANG. Thereupon, Jorden's technician employment was automatically terminated, because, as we have noted, only military members of the Guard are eligible for technician employment. At the time of

his discharge Jorden was a master sergeant in the PaANG military unit and an assistant office manager in the technician program.

Jorden then brought a civil rights suit in the United States District Court for the Eastern District of Pennsylvania alleging that his various superiors had engaged in a conspiracy to harass him and to discharge him on the basis of race and in retaliation for the exercise of his first amendment rights. Specifically, he asserted claims for damages under 42 U.S.C. §§ 1983, 1985 and 1986 against General Scott, Colonel John D. Campbell and Major Henry C. Frisby, all of whom were both his military officers and his civilian supervisors; a pendent state common law claim of defamation against

Scott, Campbell and Frisby; and claims for reinstatement against the aforementioned defendants, as well as against Emmett Walker, Chief of the National Guard Bureau ("NGB") and against the NGB itself.[3]

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[3]Because Jorden asserted no proper jurisdictional basis for a suit against the NGB, the NGB was properly dismissed as a defendant. The NGB is an agency of the United States and is thus protected form lawsuits unless there has been a waiver of sovereign immunity. The Administrative Procedure Act ("APA"), 5 U.S.C. § 702 et seq. (1982), constitutes such a waiver, but Jorden does not make an APA challenge to actions of the NGB, whose only official action, the withdrawal of recognition of Jorden in ANGUS, was ministerial. Jorden does not dispute that, once he was removed from PaANG, he automatically lost his status in ANGUS. Rather, he intimated to the

(FOOTNOTE CONTINUED)

Defendants moved for dismissal of plaintiff's entire case, invoking both Fed.R.Civ.P. 12(b)(1) and (6). As we have noted, the district court granted the motion to dismiss,[4] finding that Jorden's federal claims were barred by Chappell v. Wallace, 462 U.S. 296 (1983), and then dismissing the

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district court that certain currently unknown employees of the NGB (in addition to Walker) were aware of the conspiracy against him and acquiesced in it in violation of 42 U.S.C. § 1986. However, while such individuals may be sued, the NGB is not a "person" within § 1986. Nor is it necessary to include the NGB as a defendant to enable the implementation of a court order of injunctive relief. State defendants can reinstate Jorden to PaANG, and defendant Walker, Chief of the NGB, can reinstate Jorden to ANGUS.

[4]The district court's opinion did not distinguish 12(b)(1) and (6), and its order did not specify whether the dismissal was pursuant to (1) or (6).

state common law claim because pendent jurisdiction was lacking.[5]

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[5]In a conclusory footnote, the court held that Jorden's failure to exhaust administrative remedies was an additional basis for dismissal. We disagree. It is true that Jorden has recourse to the Air Force Board for the Corrections of Military Records ("AFBCMR") under 10 U.S.C. § 1552 (Jorden has petitioned for relief under § 1552 and the petition is pending.) Some courts have dismissed actions because plaintiffs had not availed themselves of this remedy, see, e.g., Sanders v. McCrady, 537 F.2d 1199 (4th Cir. 1967). However, this court has not adopted a per se exhaustion requirement for military personnel. Indeed, in Nelson v. Miller, 373 F.2d 474, 479-80 (3d Cir.), cert. denied, 387 U.S. 924 (1967), we explicitly rejected a rule that would require recourse to 10 U.S.C. § 1552 before military personnel could bring a claim. Rather, we said, exhaustion depends on the potential adequacy of that remedy in the particular case. Nelson is consistent with our approach to exhaustion generally, see, e.g., First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980), which favors exhaustion but does not require it where the administrative remedy would

(FOOTNOTE CONTINUED)

be inadequate. In this case, the AFBCMR cannot afford Jorden satisfactory relief. As defendants concede, the AFBCMR, a federal Board, cannot order Jorden's reinstatement to the state Guard. See Penagaricano v. Llenza, 747 F.2d 55, 57 (1st Cir. 1984). Moreover, the AFBCMR is a military Board that is arguably not empowered to reinstate Jorden to his civilian technician position in any event. See Rolles v. Civil Service Commission, 512 F.2d 1319, 1326 (D.C. Cir. 1975) ("[T]he Board does not have the authority or the power to order the reinstatement with back pay of an employee to a civilian position. The Board performs a purely military function.")

Neither the district court nor defendants contend that there are adequate state remedies, and, in any event, the exhaustion of state administrative remedies is not required in § 1983 actions. Patsy v. Florida Board of Regents, 457 U.S. 496, 516 (1982).

II. Plaintiff's Damages Action

A. History of the Availability of Damages Suits Against Military Officers

Military officers have not always been afforded absolute immunity from damages suits. The leading nineteenth century case is Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849), after remand Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851), in which the Court held that a naval commander alleged to have flogged and imprisoned an enlisted seaman could be held liable for damages at common law.

The ability of servicemen and other aggrieved persons to recover damages in a military context was dealt a severe blow by the Supreme Court's decision in Feres v. United States, 340 U.S. 135 (1950). In Feres, the Court

held that the United States was immune from liability under the Federal Tort Claims Act for torts arising out of or incident to military service. The Court was concerned, inter alia, with deference to Congress, which had provided a system of military remedies. Although Feres does not explicitly rely on the special requirements of military discipline, in subsequent cases the Court has observed that "Feres seems best explained by the 'peculiar and special relationship of the' soldiers to his superiors, (and) the effect of the maintenance of such suits on discipline . . . .'" United States v. Muniz, 374 U.S. 150, 162 (1963), quoting United States v. Brown, 348 U.S. 110, 112 (1954). Feres did not address the propriety of common law suits against individual officers, such as the action brought in Wilkes.

The availability of damages relief against military officers was subsequently affected by two Supreme Court cases that did not involve military officers but whose holdings concerned damages actions against governmental officials in general. In Monroe v. Pape, 365 U.S. 167 (1961), the Court greatly expanded the potential liability of state officers under § 1983[6] and in Bivens v. Six Unknown

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[6]Prior to Monroe it was widely believed that § 1983's "color of law" requirement was met only where the state had authorized the conduct in question. Monroe clarified that the "color of law" requirement extended to "any official conduct -- whether valid under state law or not." P.Schuck, Suing Government 48.

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court recognized a damages action brought directly under the Constitution against federal officers. In the aftermath of these cases, both the Supreme Court and this circuit gave their imprimatur to damage suits against military officials for the violation of constitutional rights. Scheuer v. Rhodes, 416 U.S. 232 (1974) (Adjutant General of Ohio and subordinate officers not immune from damage suits arising out of events in connection with the Kent State shooting); Chaudoin v. Atkinson, 494 F.2d 1323, 1332 (3d Cir. 1974) (remanding case to district court with instructions to award damages to guardsman in suit against Adjutant General of Delaware); Lasher v. Shafer, 460 F.2d 343, 348 (3d Cir. 1972) (rejecting claim of automatic

immunity for state military officers in § 1983 suit and remanding for development of factual record to determine if immunity is appropriate).

However, in 1982, this court held that soldiers who alleged that they were ordered to stand in a field while a nuclear device was exploded nearby could not bring a Bivens damages action against their federal military officers. Jaffe v. United States, 663 F.2d 1226 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982) ("Jaffe II"). We did not address whether the holding affected constitutional claims brought under § 1983 against state military officers.

One year later, in Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court faced a Bivens claim for damages brought by servicemen against

their naval officers alleging racial discrimination in making duty assignments, performing evaluations and imposing penalties. The Court essentially adopted the reasoning of Feres, finding that concern for military discipline and deference to Congress required rejection of the Bivens claim brought by the plaintiffs.

As noted, the district court found that Chappell barred Jorden's damages suit. Determining whether this holding was correct requires analysis of two issues. First, we must decide whether the reasoning of Chappell, which dealt with a Bivens claim against federal military officers, also applies to § 1983 actions against state military officers. Because we conclude that it does, we must then consider Jorden's contention that Chappell does not prohibit all or

even most damages actions against military officers but compels a fact-specific inquiry into whether judicial review in a particular case will unduly interfere with the military mission.[7]

B. Does Chappell Apply To § 1983 Actions?

Jorden's counsel made clear at oral argument that the claim against Walker, the only federal military officer in the case, was for injunctive relief only. Thus, this case involves no Bivens

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[7]We shall focus our analysis on Chappell because we find that Jaffe v. United States, 663 F.2d 1226 (3d Cir. 1982) (en banc), cert. denied, 456 U.S. 972 (1982) ("Jaffe II"), offers no additional illumination on the relevant questions. The district court and all of the parties similarly focused on Chappell.

damages claims. Rather, Jorden's damages claims are brought against federal military officers under the Reconstruction Civil Rights statutes. Because Chappell involved Bivens claims against federal military officers and not § 1983 claims against state military officers, it is not clear whether Chappell controls this case. This uncertainty is heightened by two footnotes near the end of the Chappell opinion.

Footnote 2 distinguished Wilkes v. Dinsman, supra, on the ground that "[Wilkes] involved a well-recognized common law cause of action . . . and did not ask the Court to imply a new kind of cause of action." 462 U.S. at 305 n.2. In another footnote, the court explicitly declined to address whether the plaintiff's claim under 42 U.S.C. § 1985(3) was barred because the issue

had not been briefed. Id. n.3. These two footnotes lend credence to the view that Chappell was limited to Bivens claims (a "new" judicially-created remedy), and does not apply to damages claims brought under § 1983. Yet, the courts of appeals that have considered the question have, with little discussion, extended Chappell to bar actions brought against state military officers under § 1983. Brown v. United States, 739 F.2d 362, 367 (8th Cir. 1984), cert. denied ____ U.S. ____, 105 S.Ct. 3524 (1985); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984), cert. denied 105 S.Ct. 2675 (1985). These courts have observed that the disruptive effect of damages suits on military discipline is the same regardless of

whether the suit is a Bivens claim against federal military officers or a § 1983 claim against state military officers.[8] Thus, they have held that there is no "reasoned distinction for the purposes of the Feres doctrine between Bivens-type actions under the Constitution and actions brought under a federal civil rights statute." Brown, 739 F.2d at 367.

We believe that the issue is more problematic than these courts have suggested. Bivens claims and § 1983 claims are not entirely parallel, for the former is a judicially-created remedy while the latter was created by

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[8]It bears emphasis that in both Brown and Martelon, as in the instant case, the military officers were National Guard officers whose training and military exercises are generally integrated with the National defense.

Congress. As we noted in Johnson v. Orr, 780 F.2d at 395 n.17 (3d Cir. 1986), the concern for deference to Congress that may lead a court to preclude a Bivens action is not present where the preclusion of a § 1983 action is at issue. However, the Supreme Court in Butz v. Economou, 438 U.S. 478, 500 (1978), left little doubt that where immunity of government officials is concerned, § 1983 and Bivens claims must be treated alike.

Butz posed the obverse situation of the instant case. In Butz, the government tried to argue that notwithstanding the fact that the Court had granted state officials only qualified immunity under § 1983, federal officials

should receive greater immunity from Bivens claims. In the instant case, the Supreme Court having already held that federal military officials have immunity, the question is whether state officials should receive equal immunity. This distinction is not significant, however, given the unequivocal command of Butz that Bivens claims and § 1983 suits are to be treated as identical for the purposes of immunity:

> [I]n the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by Bivens than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by § 1983 are of no greater magnitude

than those for which federal officials may be responsible. The pressures and uncertainties facing decision-makers in state government are little if at all different from those affecting federal officials. We see no sense in holding a state governor liable but immunizing the head of a federal department; in holding the administrator of a federal hospital immune where the superintendent of a state hospital would be liable. . . . Moreover, the Government's analysis would place undue emphasis on the congressional origins of the cause of action in determining the level of immunity . . . . [W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officals.

Butz, 438 U.S. at 500-02, 504. Accord Harlow v. Fitzgerald, 457 U.S. 800, 819 n.30 (1982) (following Butz).

A holding that Chappell applies to bar or limit § 1983 damages claim is troublesome in one respect. Immunity from § 1983 damages claims generally requires a court's determination that: 1) there was a common law immunity at the time of the passage of § 1983 in 1871; and 2) Congress did not seek to abolish that immunity in passing § 1983. City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 258-59 (1981). See also Tenney v. Brandhove, 341 U.S. 367, 376-78 (1951) (legislators immune from § 1983 damages suit because Congress did not intend to abolish their common law immunity); Pierson v. Ray, 386 U.S. 547 (1967) (same analysis leads Court to find judges immune from § 1983 damages

actions). However, because Chappell dealt with a Bivens claim, the Court undertook no such inquiry (and, in fact, military officers were not absolutely immune from common law suits for damages when § 1983 was passed, see supra, p. 9).

In sum, to apply Chappell to § 1983 actions is problematic because Chappell was based not on the existence of a common law immunity for military officers but on policy considerations that, while relevant to immunity of federal officers from Bivens suits, may be less relevant to immunity of state officers from § 1983 suits.[9]

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[9]One commentator made this point in criticizing Harlow v. Fitzgerald, supra, for treating § 1983 and Bivens claims as identical for immunity purposes:

(FOOTNOTED CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

> The abbrogation of the subjective element of immunity in Harlow, however, was premised solely upon the Court's assessment of public policy. While this may be appropriate for Bivens actions, which are largely a creation of the judiciary, the Court does not have the discretion to depart from the intent of the legislature and apply its own notions of policy to section 1983 actions.
>
> As previously discussed, immunity to section 1983 liability is founded in Congress' presumed adoption of immunities that were established at common law. Therefore, the paramaters of the qualified immunity under section 1983 must be defined by reference to the common law . . . . The judicial abolition of the subjective element of the immunity for Bivens actions . . . cannot and should not simply be extended to

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> section 1983 actions. Only Congress may properly determine whether public policy mandates amending section 1983 . . .for the immunity defense.

Gildin, The Standard of Culpability In Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and The Constitution, 11 Hofstra L. Rev. 557, 587-88 (1983).

The question whether § 1983 and Bivens actions should be treated identically for immunity purposes turns, in part, on how much significance ought be attached to the fact that Congress has provided explicit statutory remedies against state officers but not against federal officers. Compare majority opinion in Butz, 438 U.S. at 502-03 n.30 (stating that the fact that Congress created actions against state and not federal officers is a function of historical contingencies of 1871 and is no longer relevant) with dissenting opinion (Rehnquist, J.) at 525-26 (attaching great significance to Congress' choice to make state, but not federal, officers liable for constitutional violations and concluding that the notion "that there should be no difference in immunity between state and federal officials remains subject to serious doubt.")

Even if this argument is correct, however, Butz prevents us from adopting it. The argument contradicts the unequivocal command of Butz that immunity for federal officers from Bivens claims is identical to that of state officers from § 1983 suits.

Nor can we evade the command of Butz by stating that, as a matter of policy, immunity for federal military officers is more important than immunity for state military officers. Rather, we recognize that "[t]he Guard is an essential reserve component of the Armed Forces of the United States." Gilligan v. Morgan, 413 U.S. 1, 7 (1973). It is common knowledge that, in the event of a surprise attack, the Guard may be the first line of defense. See 32 U.S.C. § 102 ("[I]t is essential that the strength and organization of the Army

National Guard and the Air National Guard as an integral part of the first line defense of the United States be maintained and assured at all times.") Indeed, Congress recently passed a resolution, Pub. L. No. 99-290, 100 Stat. 413 (1986), designed to "reaffirm Congressional recognition of the vital role played by members of the National Guard . . . in the nation's armed forces." H.Rep. No. 504, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong & Ad. News 1294.

Thus, the conclusion that state military officers have at least a certain immunity from § 1983 damage actions is compelled by the combination of Chappell and Butz: the former disallowing a Bivens claim against federal military officials and the latter holding the same for purposes of

immunity.[10] Our next task is to determine the scope of that immunity.

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[10]Judge Gibbons would apparently limit Butz to its facts, and not read it to require that federal officials and state officials be treated alike for immunity purposes. However, he overlooks the significance of the Court's extensive discussion, see supra, p. 14, designed to show that logic dictates that federal officials and their counterpart state officials should be equally susceptible or insusceptible to suit. Given this lesson of Butz, Judge Gibbons' other point, that Chappell is not actually an immunity decision, is insignificant. Chappell limits the availability of Bivens damages actions against federal military officials, and we would therefore contradict the logic of Butz if we did not similarly limit the availability of § 1983 damages actions against state military officials.

On the basis of Nixon v. Fitzgerald, Judge Gibbons argues in his dissent that, as a general matter, analogy between the immunities accorded state and federal officials is improper. The Nixon Court did in fact reject such an analogy, but it did so because of "[t]he President's unique status under the Constitution." 457 U.S. at 750 (emphasis added). Nothing in Nixon suggests that the state/federal analogy is improper for any other official, and as we have already discussed, see transcript at ____, Butz explicitly directs us to reason in this manner.

C. The Scope of Chappell's Prohibition on Damage Claims

We have just determined that, notwithstanding the fact that Chappell dealt with a Bivens claim against federal military officers whereas Jorden's damages claim is a § 1983 claim against state military officers, Chappell applies to this case. It does not necessarily follow, however, that Jorden's claim is barred. Rather, we must consider Jorden's contention that Chappell bars damages action only after a court has determined that, in a particular case, hearing a damages claim would threaten military discipline.

The majority of courts to consider the question have rejected that contention, holding instead that Chappell

establishes a per se prohibition of damages actions against military officers for violations of constitutional rights. Trerice v. Summons, 755 F.2d 1081 (4th Cir. 1985); Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied ____ U.S. _____, 105 S.Ct. 2675 (1986); Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 104 S.Ct. 1595 (1984); Alvarez v. Wilson, 600 F.Supp. 706 (N.D. Ill. 1985). However, several courts have disagreed in whole or in part. Stanley v. United States, 574 F.Supp. 474 (S.D. Fla. 1983), aff'd. 786 F.2d 1490 (11th Cir. 1986) (Chappell requires analysis of whether allowing suit in the particular case will threaten the military mission); Shaw v. Gwatney, 584 F.Supp. 1357, 1362 (E.D. Ark. 1984) (Chappell requires balancing strength of the right and likely degree

of interference with the military order for determining whether suit is barred); cf. Brown v. United States, 739 F.2d 362 (8th Cir. 1984)(Chappell automatically bars damages actions except in rare case in which alleged conduct is entirely unrelated to military mission).

Jorden relies primarily on the reasoning of Stanley v. United States, 574 F.Supp. 474 (S.D. Fla. 1983), aff'd 786 F.2d 1490 (11th Cir. 1986),[11] which involved experimental administration of LSD to soldiers. Stanley held that Chappell required courts to undertake a fact-specific inquiry that

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[11]Jorden relied on the opinion of the Florida district court, because it was not affirmed until after the briefing and oral argument in this case had already occurred. However, the Eleventh Circuit adopted the district court's reasoning.

focuses on the nature of the military conduct in question, i.e., whether it was the kind of conduct that courts could not scrutinize without jeopardizing military discipline.

We believe that the Stanley court misread Chappell. It appears to have been influenced by the following statement in Chappell: "[N]or do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 462 U.S. at 304. The Stanley court saw that language as limiting Chappell to its facts. We disagree. This interpretation ignores the fact that the Chappell Court, following its qualification that it had not closed the door on all military claims, cited three cases to illustrate the kind of suits that remained

viable: Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); and Frontiero v. Richardson, 411 U.S. 677 (1973). None of those cases involved damages actions against military officers. And almost immediately after these citations the Court stated: "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 305.

The clear implication of Chappell is that while some non-damage constitutional claims involving the military remain viable, damage claims do not. The Stanley court's approach would frequently require courts to make difficult and hair-splitting distinctions as to whether a particular claim was the

sort that, if legally actionable, would threaten military discipline. This approach seems questionable as a matter of policy. In any event, we simply do not read Chappell as sanctioning this kind of case-by-case approach.

We thus believe that the Supreme Court was laying down a general rule barring damages actions by military personnel against superior officers for constitutional violations, rather than authorizing a fact-specific inquiry. The Eighth Circuit understands Chappell to leave room for an exception where the conduct complained of has "total antipathy to any conceivable military purpose." Brown v. United States, 739 F.2d 362, 367 (8th Cir. 1984). The instant case does not give us occasion to evaluate the possibility that Chappell leaves room for such an exception because the

immediate cause of Jorden's discharge was his disobedience of a military order from a superior officer; it cannot be said that the order had no "conceivable military purpose." Under the circumstances, Chappell clearly bars a § 1983 damages action.[12]

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[12]Jorden sought damages under 42 U.S.C. §§ 1985(3) and 1986 as well. Having determined that defendants are immune from a damages action under § 1983, we cannot see any basis for holding them susceptible to suit under §§ 1985 and 1986. See Mollnow v. Carlton, 716 F.2d 627, 629-30 (9th Cir. 1983), cert. denied 104 S.Ct. 1595 (1984)(extending Chappell to bar claim under § 1985); Elliot v. Perez, 751 F.2d 1472 (5th Cir. 1985) (treating § 1983 and § 1985 together for immunity purposes).

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In addition, we must dismiss Jorden's common law cause of action. Chappell hinted that the common law cause of action in Wilkes v. Dinsman may remain viable, 462 U.S. at 305 n.2. However, Wilkes involved an oppressive and malicious flogging. Especially in light of the recent decisions of the Court restricting the availability of damages actions against the military, we are unwilling to extend Wilkes beyond its facts. See Trerice v. Summons, 755 F.2d 1081, 1084 (4th Cir. 1985). Jorden's allegations -- that defendants gave him unfavorable treatment for unconstitutional reasons -- resemble plaintiffs' allegations in Chappell, in which the Court found Wilkes inapposite. 462 U.S. at 305 n.2. Cf. Trerice v. Pedersen, 769 F.2d 1398, 1404 (9th Cir. 1985) (Wilkes no longer viable).

It is worth noting that we do not determine the availability of a damages action in a case like Johnson v. Orr, supra n.2. where a Guard technician is dismissed from his civilian employment for circumstances arising wholly in the civilian context.

III. Jorden's Claims for Reinstatement

Our conclusion in part II establishes that the district court was correct to dismiss Jorden's claim for damages. We now turn to his claim for injunctive relief, i.e., reinstatement.

A. History of Availability of Injunctive Relief Against The Military

The Supreme Court has heard many cases involving claims for injunctive relief against the military without even suggesting that the claims were not reviewable in a civilian court. The most notable exception is Gilligan v. Morgan, 413 U.S. 1 (1973), a case arising out of the Kent State shootings in 1970. Kent State students brought

suit seeking far-reaching injunctive relief "to restrain [the governor] in the future from prematurely ordering National Guard troops" and "to restrain leaders of the National Guard from future violations of the students' national rights." Id. at 3. Finding that the relief requested was a "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard," a step that would require "a judicial evaluation of the appropriateness of the training, weaponry and orders of the Ohio National Guard." Id. at 5-6, the Court declared the matter inappropriate for judicial resolution. However, the Court explicitly stated that its holding involved no broad rule:

> [I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.

Id. at 11-12.

Several subsequent cases have confirmed that the Court has not established a per se rule that military matters are not subject to judicial review. Rotsker v. Goldberg, 453 U.S. 57 (1981)(equal protection challenge to all-male draft registration); Brown v. Glines, 444 U.S. 348 (1980)(first amendment attack on Air Force regulation with respect to circulation of petitions); Parker v. Levy, 417 U.S. 733 (1974) (vagueness challenge to criminal

provisions of military code); Frontiero v. Richardson, 411 U.S. 677 (1973)(equal protection challenge against statutes discriminating against women in military benefits).

Chappell made no direct reference to claims for injunctive relief against the military, but it did cite Brown, Parker and Frontiero as examples of suits against the military that remain viable. 462 U.S. at 304-05. Three years after Chappell, the Court heard another case involving a claim for injunctive relief in the military context, and made no mention of a reviewability problem. Goldman v. Weinberger, ____ U.S. _____, 106 S.Ct. 1310 (1986)(naval officer's refusal to permit plaintiff to wear yarmulke upheld).

This court, too, has entertained suits for injunctive relief against the military. In Jaffee v. United States, 592 F.2d 712 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979)("Jaffe I"), we reviewed the actions of the military under the Administrative Procedure Act. More recently, in Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981), we held that, as a general matter, requests for injunctive relief against the military are reviewable. We stated that the only exceptions to this rule were rare cases, such as Gilligan v. Morgan, supra, where the kind of relief requested would involve the court in tasks well outside of its capacity and function. See discussion infra at 27.

B. Should Jorden's Claims for Reinstatement Have Been Dismissed?

Although the district court made no specific mention of Jorden's claims for injunctive relief, i.e., reinstatement, it apparently found those claims barred by Chappell. We disagree. Chappell itself suggests that it leaves open claims for injunctive relief against the military, and has been so interpreted by every court to consider the question. Moreover, we find that permitting injunctive relief while denying a damages remedy is supported by considerations of policy. Finally, the law of this circuit dictates that Jorden's claim for injunctive relief be permitted.

As noted above, Chappell stated that it was not closing the door on claims against the military for constitutional violations, and cited as examples of viable actions three cases -- Brown, Frontiero, and Parker -- that involved injunctive relief. It is true that those cases, like Rotsker, involved facial constitutional challenges to regulations or statutes concerning the military. However, the Court in Brown expressly stated that judicial scrutiny was not limited to facial constitutional challenges: rather, legitimate constitutional claims could arise from the application of these statutes and regulations. 444 U.S. at 357 n.15. The recent Goldman case involved such a challenge.

All of the courts to consider the question have held that Chappell leaves open claims by discharged military personnel for injunctive relief. Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985); Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); Gant v. Binder, 596 F.Supp. 757 (D.Neb. 1984), aff'd. 766 F.2d 358 (8th Cir. 1986).[13] In Ogden, in which plaintiff alleged that his military superior's application of an "off-limits" declaration violated his first amendment rights, the court said:

> The district court did not expressly deny plaintiffs' claims for injunctive relief nor specifically consider whether

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[13]The Eighth Circuit assumed without deciding that the district court was correct in finding that Chappell did not bar the injunctive claim.

the Chappell decision was also a bar to such relief. We hold that Chappell does not preclude an equitable remedy and that the district court erred in not addressing the injunctive requests. Chappell contains the express qualification that military personnel are not barred from "all redress in civilian courts for constitutional wrongs suffered in the course of military service." The Court cited three of its decisions as supporting this proposition. These cases involved facial attacks on the constitutionality of statutes and regulations concerning the military . . . The suits requested nonmonetary relief, as opposed to the monetary damages sought in Chappell . . . The implication that the Court could forbid the unconstitutional prohibition of protected conduct is clear.

758 F.2d at 1175-76 (emphasis added). Although Ogden did not involve a suit for reinstatement, its analysis supports the view that Chappell ruled out only claims for damages, not injunctive relief. Moreover, Gant and Penagaricano, which did involve claims for reinstatement, held that Chappell leaves available suits for reinstatement by discharged military personnel.

One of the concerns underlying Chappell is the need for military officers' uninhibited decisionmaking, and the threat to such decisionmaking if officers fear personal liability. The threat of personal liability for damages poses a unique deterrent to vigorous decisionmaking. See generally, P. Schuck, Suing Government (1983). On the other hand, the possibility that an officer may be compelled by a court to

cease applying a particular regulation in an arbitrary manner, or to reinstate an improperly discharged soldier, poses much less of a threat to vigorous decisionmaking. Indeed, it is for this reason that government officials are often immune from damages but susceptible to injunctions. See, e.g., Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 737 (1980) ("Prosecutors enjoy absolute immunity from damages liability . . . but they are natural targets for § 1983 injunctive suits.").

Our analysis of Chappell, however, does not end the case. For while Chappell did not require the district court to dismiss Jorden's claim for reinstatement, it did not require the court to hear the claim. Absent a decree

from the Supreme Court to the contrary, lower courts must apply their own jurisprudence to determine whether claims for injunctive relief against the military are appropriate. For example, after finding that Chappell did not bar plaintiff's claim, the First Circuit in Penagaricano dismissed the claim by virtue of First Circuit law on reviewability of claims involving the military. Thus, the question whether the district court erred in dismissing Jorden's claim for reinstatement turns on this court's approach to the availability of claims for injunctive relief against military officials.

As noted, the law in this circuit, established in Dillard v. Brown, heavily disfavors finding injunctive claims against the military

non-reviewable.[14] Dillard involved a woman Guard member who was discharged from the Guard because of a regulation that forbade the enlistment of single parents. She alleged that the Guard had applied the regulation in an unconstitutionally discriminatory manner.[15] The district court had held that this military matter was not reviewable in

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[14]It is clear that Dillard was not overruled by either Chappell or Jaffe II. We have already discussed at length the fact that Chappell does not bar claims for injunctive relief. Similarly, in Jaffe II we explicitly stated that "what we are called upon to decide is simply whether plaintiffs are entitled to money damages." 663 F.2d at 1240.

[15]She also alleged that the regulation was facially unconstitutional, a claim this court appeared to regard as frivolous. 652 F.2d at 324 n.6.

the civilian courts. This court reversed, holding that suits against the military are non-cognizable in federal court only in the rare case where finding for plaintiff "require[s] a court to run the military." 652 F.2d at 322. We gave as one example Gilligan v. Morgan, 413 U.S. 1 (1973), in which the plaintiffs asked the court to engage in ongoing regulatory supervision of the Guard. Absent such an extreme case, "[i]f the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable." Dillard, at 323-24 (emphasis added).[16]

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[16]In Dillard we explicitly rejected the test set forth by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), for determining

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Like the plaintiff in Dillard, Jorden alleges that he was discharged in violation of his constitutional rights. Also like plaintiff in Dillard, if Jorden establishes a constitutional

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whether a court should hear a particular claim involving the military. See, Note, Judicial Review of Constitutional Claims Against the Military, 84 Colum. L. Rev. 387 (1984) (praising Dillard as superior approach to Mindes). The Mindes test requires balancing, inter alia, the importance of the constitutional right asserted and the anticipated extent to which review will interfere with the military mission. We note that Jorden's claim would likely be reviewable under a Mindes balance. He alleges race discrimination and retaliation for the exercise of politically-related speech, both of which are very important constitutional claims. Moreover, reviewing the military order in question, an unusual order, affecting only one individual and occuring not only off the battlefield but during a time when the plaintiff was not in active service, is not likely to have a deleterious effect on military decisionmaking generally.

violation, the remedy will be a court-ordered reinstatement, rather than the kind of ongoing judicial oversight held inappropriate in Gilligan. Under Dillard, Jorden's claims for reinstatement are reviewable.

As we have explained above, Chappell neither required nor forbade the district court from dismissing Jorden's claims for reinstatement. We believe the law of this circuit, supported by considerations of policy, dictates that these claims should not have been dismissed.[17]

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[17]Obviously, the claims for reinstatement against state defendants are properly brought under § 1983. Jurisdiction over defendant Walker, Chief of the NGB, is maintainable either under § 1983 or directly under the Constitution. See Knights of the Klu Klux Klan v. East Baton Rouge Parish, 735 F.2d 895, 900 (5th Cir. 1984) (federal officials who conspire or act

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jointly with state officials may be liable under § 1983); Reuber v. United States, 750 F.2d 1039, 1061 (D.C. Cir. 1984) (Federal injunctive relief is available directly under the Constitution against federal actors committing constitutional violations).

IV. Conclusion

For the reasons stated above, we hold that the district court was correct in dismissing Jorden's damages claims, but incorrect in dismissing his claims for reinstatement. Thus, on remand, if Jorden can demonstrate that the discharges violated his constitutional rights, he is entitled to reinstatement.

We shall affirm the judgment of the district court insofar as it dismisses plaintiff's damages claims and dismisses all claims against the NGB. We shall reverse the judgment of the district court insofar as it dismisses plaintiff's claims for injunctive relief against the individual defendants, and shall remand this case for further proceedings.

GIBBONS, Circuit Judge, dissenting.

I join the opinion of the court to the extent that it reverses the district court's dismissal of Jorden's claims for injunctive relief. However, I disagree with the majority's disposition of the damage claims, and I dissent on this point.

The issue presented by Jorden's appeal of the district court's dismissal of his damage claims is whether a state national guard official is immune from a section 1983 suit brought by another member of the national guard unit. The Supreme Court frequently has addressed claims bearing on immunities available to section 1983 defendants and in doing so has delineated a relatively straight-

forward analysis for assessing such claims. Resort to that controlling analysis in this case makes quite clear that the defendants here are not immune from damage liability under section 1983.

In assessing immunity claims by 1983 defendants, the Court first has looked to see if any relevant immunity existed prior to the enactment of section 1983. If such immunity did exist, the Court has then looked at the legislative history that accompanied enactment of section 1983 to see if it reveals any congressional intent to abolish that immunity. Should no such intent manifest itself, the Court finally has weighed policy considerations relevant to the asserted immunity. Only when all three conditions have been satisfied -- the existence of pre-existing immunity, the absence of congressional intent to abolish that

immunity, and the absence of policies disfavoring immunity -- has the Court held the defendant to be immune. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-71 (1981) ("Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983."); Imbler v. Pachtman, 424 U.S. 409, 417-29 (1976) (employing same analysis in holding that state prosecutors are immune from section 1983 damage suits in certain circumstances); Schueur v. Rhodes, 416 U.S. 232, 238-49 (1974) (employing same analysis in holding that a state governor, senior state national

guard officers, and the president of a state-controlled university were not absolutely immune from section 1983 damage suits in certain circumstances); Pierson v. Ray, 386 U.S. 547, 553-57 (1967)(employing same analysis in holding that a state judicial officer was absolutely immune and state police officers had good-faith immunity from section 1983 damage suits in certain circumstances); cf. Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951) (employing similar analysis in holding that immunity-like privilege accorded legislators immunized state legislators from section 1983 damages suits in certain circumstances).

In this case, in which state national guard officers contend that they are absolutely immune from a damage suit brought by a subordinate, one cannot progress past the first step of the

analysis. Not only were military officers not immune from such damage actions prior to enactment of section 1983, the Supreme Court, in a case decided shortly before the passage of section 1983, held expressly that they were liable in such actions. See Wilkes v. Dinsman, 48 U.S. 93, 135-37, 7 How. 88, 128-30 (1849) (reversing trial court dismissal of enlisted man's suit against superior officer and holding that defendant officer was not absolutely immune from damage action.)[1] Thus, unless Judge

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[1]The Court subsequently affirmed this holding in Dinsman v. Wilkes, 53 U.S. 414, 428, 430, 12 How, 402-03. 404-05 (1851).

Becker is prepared to argue that in enacting section 1983 Congress created a new immunity available to the defendants in this case, controlling precedent precludes any holding that the defendants in this case are immune to the section 1983 damage claim.

To his credit, Judge Becker acknowledges the Supreme Court's methodology for evaluating immunity claims asserted by state officials defending section 1983 suits, see Typescript at 15, and notes that prior to the enactment of section 1983 military officials were not immune from damage suits, see Typescript at 9. However, other than to note that his holding is "troublesome in one respect", Typescript at 15, he offers no explanation of how the holding squares with the acknowledged methodology or with the noted immunity law.

What Judge Becker does offer in defense of his holding is Butz v. Economou, 438 U.S. 478 (1978), and Chappell v. Wallace, 462 U.S. 296 (1983). More specifically, he asserts first that Butz stands for the proposition that the immunity available to section 1983 defendants is the same as that available to similar defendants sued under a Bivens theory. From this he argues that, because, according to him, the Supreme Court held in Chappell that federal military officers are immune from Bivens' suits, state national guard officers are thus immune from section 1983 damage suits. Typescript at 13-17. This argument is without merit.

First, Judge Becker mischaracterizes the holding of Butz. In that case the plaintiffs brought a Bivens action against officials of the executive branch of the federal government. The district court and the court of appeals had rejected the defendants' assertions that they were absolutely immune, and the defendants had appealed. In assessing the defendants' claim to absolute immunity, the Court canvassed one hundred and fifty years of Supreme Court case law that had held federal executive branch officials to be liable in damage suits in various circumstances, see id. at 486-89, and also reviewed cases that had held that state officials were not absolutely immune from section 1983 damage actions. see id. 496-504. Relying on these two lines

of cases, the Court held that the defendants were not absolutely immune from Bivens damage liability. In so holding the Court, using the language quoted by Judge Becker, see Typescript at 14, rejected the defendants' assertion that they were entitled to greater immunity than were their state counterparts.

Judge Becker reads Butz to stand for the "unequivocal command . . . that Bivens' claims and § 1983 suits are to be treated as identical for the purpose of immunity." Typescript at 14. To the extent that statement suggests -- as Judge Becker's analysis indicates -- that Butz holds that any state defendant sued for damages under section 1983 is absolutely immune if that defendant's federal counterpart would be absolutely

immune to a Bivens claim, he is distorting Butz. Furthermore, implicit in such a suggestion is the assertion that Butz modifies the cases in which the Court has delineated pellucidly the analysis -- discussed above -- appropriate for determining when state officials are immune from section 1983 damage actions. Nothing in Butz, or in Fact Concerts, which was decided after Butz, supports such a novel assertion.

Even if one were to assume for the purposes of argument that Butz establishes the proposition for which Judge Becker cites it, the reasoning underlying his resolution of the immunity issue is still flawed. Judge Becker argues that in light of Butz the state national guard defendants are immune from this section 1983 suit because, he asserts, the Supreme Court

held in Chappell that federal military officials are immune to Bivens suits. Yet this argument is unavailing, for Chappell does not hold what Judge Becker suggests it does.

In Chappell enlisted naval men filed a Bivens suit against their superior officers, seeking damages for alleged constitutional violations. The district court dismissed the plaintiff's complaint on the grounds that the underlying military actions could not be reviewed by a civilian court, that the defendants were immune, and that the plaintiffs had failed to exhaust administrative remedies. 462 U.S. at 298. The Court of Appeals for the Ninth Circuit reversed, holding that district court had incorrectly assessed the justiciability and immunity claims. Id. The defendants then appealed to the Supreme Court.

In a unanimous decision the Court reversed the Ninth Circuit. However, contrary to the necessary implication of Judge Becker's argument, that reversal was not predicated on the conclusion that the defendants were immune from suit. Indeed, it is quite clear that the Court did not address the issue of the defendants' immunity. Rather, the decision dealt only with the propriety of extending the judicially-created Bivens remedy to the plaintiffs, as the Court focused exclusively on whether the "special factors counselling hesitation" were present. See id. at 298-304. This reading of Chappell is corroborated by the Court's express reference to Wilkes, which it distinguished on the grounds that "it involved

a well-recognized common-law cause of action . . . and did not ask the Court to imply a new kind of cause of action." Id. at 305 n.2.

Finally, the issue remains whether the state national guard officials whose liability we consider here are the same as the federal naval officers whose liability the Court considered in Chappell. Resolution of this issue is critical because, even if Judge Becker's interpretation of Butz and Chappell were correct, that interpretation would allow one to conclude that the defendants here are immune from suit only if one concluded that they are state equivalents of the federal officials who were the defendants in Chappell.

Judge Becker does not attempt to argue that for the purposes of his analysis state national guard officials are the same as federal military officers. Rather, he sidesteps the issue by asserting blithely that we cannot "evade the command of Butz by stating that, as a matter of policy, immunity for federal military officers is more important than immunity for state military officers." Typescript at 16. This position is contrary to Supreme Court precedent. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), the Court in considering the President's immunity to civil liability, faced the argument that, because it had held in Scheuer v. Rhodes, 416 U.S. 232 (1974), that governors were not absolutely immune from civil liability, the President, by virtue of the similarity

of his position to that of a governor, also was not absolutely immune. The Court expressly rejected this argument, choosing instead to assess the propriety of absolute immunity in light of the President's specific constitutional responsibilities. Id. at 749-50. The Court's resort to this analysis makes clear that the Courts of Appeals, when considering granting to state officials immunities conferred upon their federal analogues, should not, as Judge Becker does, automatically immunize the state officials.

Turning to the substance of the matter, the federal military and state national guards differ in obvious and significant ways. As the Court explained in Chappell, the principal rationale for barring intramilitary damage actions by federal personnel is

the concern for "disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court." 462 U.S. at 304 (citations and internal punctuation omitted). Whatever one might think of the validity of this reasoning as it pertains to the federal military, it simply is not relevant to state national guards. While those organizations have their military aspects, they are principally civilian in character, and the interrelationships of their members are principally civilian in character. The specifics of this case highlight these facts. Jorden was hired by the PaANG as a civilian technician, and he enlisted only because

membership in the guard was a prerequisite to civilian employment. As a member he was required to serve in a military capacity for only fifteen days out of the year. During the rest of the time he served as a civilian employee and was not subject to military command. Thus it is quite clear that the attenuated concern for military discipline in this context bears no resemblance to the concern for such in the federal context. Consequently, the rationale for shielding federal military officers from damage suits does not support shielding state national guard officials from similar suits.[2]

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[2]Judge Becker attempts to equate state national guards with the federal military by pointing out that national guards are federal reserve components

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Judge Becker's argument that the Supreme Court's holdings in Butz and Chappell compel the conclusion that the state national guard officers who are the defendants in the case before us are

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and by noting that they might be involved in hostilities in case of a "surprise attack" on this country. Typescript at 16-17. By this reasoning, the military-discipline rationale of Chappell would bar conscriptable male civilians from suing military officials for damages, for they are as likely to be involved in hostilities as is any member of a state national guard.

Furthermore, Judge Becker's effort to equate state national guards with the federal military ignores the important differences in the roles of those two organizations. State national guards serve to protect the states from domestic civil disorder. By contrast, the federal military -- and the national guards, when federalized -- serve to protect the country from external threats. Indeed, federal law prohibits the federal military from participating in domestic security operations. See Posse Comitatus Act. 18 U.S.C.—§ 1385 (1982).

immune to a section 1983 damage suit is indefensible. Further, controlling Supreme Court precedent governing the recognition of immunities available to section 1983 defendants makes clear that these defendants are not absolutely immune from a section 1983 suit for damages. I therefore dissent from the majority opinion to the extent it holds otherwise.

A TRUE COPY:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ULUS JORDEN, JR.,	:	CIVIL ACTION
v.	:	No. 85-0670
NATIONAL GUARD BUREAU, et al.	:	

MEMORANDUM OF DECISION

McGLYNN, J. SEPTEMBER 24, 1985

In this action, plaintiff, Ulus Jorden, Jr., a former member of the Pennsylvania Air National Guard (PaANG) and PaANG technician, alleges he was unlawfully discharged from the PaANG in retaliation for the exercise of his rights under the First and Fourteenth Amendments to the Constitution and 42 U.S.C. §§ 1983, 1985 and 1986. Plaintiff further alleges a cause of action against defendants for defamation under Pennsylvania law and requests this court

to exercise pendent jurisdiction. Plaintiff claims that he was honorably discharged from the PaANG because he registered complaints about alleged misconduct and improprieties occurring at the Willow Grove Naval Air Station. Named in the complaint as defendants are the National Guard Bureau; Emmet H. Walker, Jr., Chief, National Guard Bureau; Richard M. Scott, Adjutant General of Pennsylvania; John D. Campbell, Colonel, Pennsylvania Air National Guard; and Henry C. Frisby, Major, Pennsylvania Air National Guard. Presently before me is defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b). Assuming the truth of the allegations in his amended complaint, I will, nevertheless, grant defendants' motion.

I.

The National Guard is a part of the organized militia of the United States. 10 U.S.C. § 101. As an integral part of the first line defenses of the United States, its strength and organization must be maintained and assured at all times. 32 U.S.C. § 102. As a military force, the Guard is unique because each unit within the Guard is responsible to both the state and federal government and serves both in time of military and civilian crisis. Members of the Air National Guard of the respective states concurrently hold membership in a distinct federal military organization, the Air National Guard of the

United States. 10 U.S.C. § 8351(a). The Guard hires full-time civilian "technicians" to perform essential and varied services such as maintenance of equipment and facilities, training and other support operations. By virtue of the National Guard Technicians Act of 1968, 32 U.S.C. § 709, these technicians, formerly referred to as caretakers and clerks, gained federal employee status. The Act requires, however, that technicians, unless otherwise exempted by regulation, must be uniformed members of the National Guard of the United States. 32 U.S.C. § 709(b). The State Adjutant General is required to terminate the civilian employment of anyone who is

separated from the National Guard. 32 U.S.C. § 709(e)(1).[1]

Plaintiff alleges that on October 3, 1984, defendant Scott, in his capacity as the Adjutant General of Pennsylvania, issued Special Order AA-472 relieving plaintiff from assignment with the 11th Combat Support Squadron at the Willow Grove Naval Air Station and honorably discharging plaintiff from the PaANG, effective the same date. Complaint ¶ 12. Because of the discharge,

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[1] 32 U.S.C. § 709(e)(1) states:

> (1) a technician who is employed in a position in which National membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

plaintiff's civilian employment was terminated pursuant to 32 U.S.C. § 709(e)(1). Complaint ¶ 13. Plaintiff contends that the Order of October 3, 1984 was issued because of plaintiff's refusal to comply with a July 13, 1984 Order, issued at the direction of defendant Campbell, which "ordered the plaintiff to active duty for 23 days for 'special training,'" and specifically "to report to the Malcolm Grow Medical Center at the Andrews Air Force Base in Maryland for medical (psychiatric) evaluation." Complaint ¶ 15. Plaintiff claims he was within his rights to refuse to comply with the Order and further claims that the Order was in retaliation for registered complaints about alleged misconduct and improprieties, including racial discrimination against plaintiff, at the Willow Grove Naval Air Station.

The Supreme Court's decision in Chappell v. Wallace, 462 U.S. 296 (1983), is controlling here and dictates dismissal of this action. In Chappell, enlisted military men brought an action against their superior officers seeking damages, declaratory judgment, and injunctive relief for alleged racial discrimination in assignments and performance evaluations. Id. at 297. The Supreme Court analyzed the direct constitutional claims in terms of whether they stated a cause of action under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The Court then reviewed the rationale of Feres v. United States, 340 U.S. 135 (1950), which held that the United States is not liable, under the Federal Tort Claims Act, for injuries to military personnel which "arise out of or are in the course of

activity incident to service." 340 U.S. at 146. In accordance with this analysis the court concluded that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens type remedy against their superior officers." Chappell, 462 U.S. 304. Quoting its previous decision in Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953), the Court stated:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States

> and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

Id. at 301. The Court further found that

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents.

Id. at 302.

The rationale of Chappell applies to the case at hand. Although this case involves reserve officers and personnel rather than regular active duty officers and personnel, the need for routine military decision-making unimpeded by judicial interference is the same. Such was the conclusion reached by the Tenth Circuit in Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 105 S.Ct. 2675, 86 L.Ed. 2d 694 (1985), and by Judge Huyett in this district in Dixon v. Pennsylvania Army National Guard, No. 82-5121 (E.D. Pa. filed January 13, 1984).

Plaintiff argues that the military action taken against him was a subterfuge to cause his dismissal as a civilian technician and, thus, Chappell

should not apply. This argument was rejected by the Supreme Court in Tennessee v. Dunlap, 426 U.S. 312 (1976). In Dunlap, plaintiff alleged that he was denied reenlistment with the National Guard to effect his termination as a technician under 32 U.S.C. § 709(e)(1) and thereby circumvent the "for cause" requirements of 32 U.S.C. § 709(e)(3).[2] The Court of Appeals for the Sixth Circuit held that if a denial of reenlistment reflects no more than a desire to terminate employment as a technician, cause must be shown under § 709(e)(3). 426 U.S. at 315. The Supreme Court reversed, finding that the

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[2] 32 U.S.C. § 709(e)(3) states:

> (3) a technician who is employed may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned.

"for cause" requirement of § 709(e)(3) is only one of several bases for terminating a technician's employment and is not intended to have any effect upon or limit one's separation from the National Guard through termination under § 709(e)(1). Id. at 664. The Supreme Court, therefore, held that the "for cause" basis of 709(e)(3) does not provide a foundation for a due process claim because it does not create a property interest in continued employment. Id.

Plaintiff's reliance on Bollen v. National Guard Bureau, 449 F.Supp. 343 (W.D. Pa. 1978), is misplaced. In that case an Air National Guard colonel was retired after thirty years of service as is generally done under 10 U.S.C. § 8851(a). Id. at 344. The court found that Bollen possessed a property interest

in continued employment because of the language of a letter from the Chief, National Guard Bureau, that authorized the retention of certain named officers until age sixty. Id. at 344-45. Although not applicable to Bollen, the court stated that this property interest is qualified by other bases of separation found in § 709(e)(1), (2) and (3). In the present case, plaintiff has not alleged that his name appeared on any such letter and, moreover, plaintiff was discharged under § 709(e)(1). For these reasons, a suit against plaintiff's superior officers in the PaANG and the Chief of the National Guard Bureau alleging constitutional violations cannot be maintained.

II.

Chappell involved a Bivens-type claim for relief. In this case plaintiff additionally asserts a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983. This claim must also be dismissed.

In Gilligan v. Morgan, 413 U.S. 1 (1973), the Court refused to entertain a suit by university students under § 1983 asking that the court examine the pattern of training, weaponry and orders of the National Guard stating:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the judiciary is not - to the electoral process.

> Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence.

413 U.S. at 10. Plaintiff's § 1983 claim has no merit. Accord Martelon v. Temple, supra; Dixon v. Pennsylvania Army National Guard, supra.

III.

In Court Four of his complaint, plaintiff alleges a conspiracy by defendants to discriminate against plaintiff on the basis of his race in violation of 42 U.S.C. § 1985(3). In Chappell, the Supreme Court declined to address whether an alleged conspiracy among defendants in violation of 42 U.S.C. § 1985(3) could be maintained. 426 U.S. at 305 n.3. However, based upon the Court's analysis in Chappell and Feres v. United

States, supra, this claim must also be dismissed.

The Ninth Circuit came to the same conclusion with respect to 42 U.S.C. § 1985(1), in Mollnow v. Carlton, 716 F.2d 627 (9th Cir. 1983), cert. denied, 104 S.Ct. 1595, 80 L.Ed. 2d 126, reh'd denied, 104 S.Ct. 2162, 80 L.Ed. 2d 547 (1984). That court held that Congress did not intend § 1985(1) to provide a remedy for military subordinates against their superiors in spite of the fact that ¶ 1985(1) legislation specifically authorizes suits by injured federal officers. In arriving at this decision, the court applied the rationale of Chappell and Feres regarding the peculiar and special relationship between an enlisted man and his superiors, the effects on discipline by the maintenance

of such suits, and Congress' use of its plenary authority over the military to establish a system of review and redress for the military. The court stated:

> A § 1985(1) action would strike directly at that special military relationship, perhaps even more so than an action for negligence. In a negligence action, a spontaneous event has occurred; someone has suffered an accident and another is at fault. Under § 1985(1), however, an action would lie even for calculated decisions made in the judgment and discretion of a superior military officer, so long as the subordinate alleged the superior had interfered with his military duties. Then a civil jury would be impaneled to inquire into the nature of this uniquely military matter, and damages could be assessed against the superiors for the exercise of their judgment and discretion. Such a result would offend the principle announced in Chappell

716 F.2d at 631. The same reasoning applies to claims under § 1985(3). Congress has enacted a "comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure." Chappell, 426 U.S. at 302. Section 1985(3) is completely foreign to that system. If the subordinate believes his superiors have conspired to violate his constitutional and civil rights, he must attack their actions before military tribunals.

IV.

Plaintiff further alleges that defendants knew plaintiff was being discriminated against in violation of § 1985 but failed to take steps to prevent it in violation of 42 U.S.C. § 1986. Section 1986 presupposes the

existence of a claim under § 1985. Sherwood v. Tomkins, 716 F.2d 632 (9th Cir. 1983), Williams v. St. Joseph Hospital, 629 F.2d 448, 452 (7th Cir. 1980). Having dismissed the § 1985(3) claims, the § 1986 claims must also be dismissed against the individual defendants.

V.

Plaintiff has sued the National Guard Bureau in its capacity as the body which would be required to implement a judgment ordering reinstatement and back pay to plaintiff if he were successful in this suit. Because I have dismissed the complaint on all substantive counts, there is no relief available to plaintiff which would require action by defendant. Accordingly, the complaint

is dismissed against the National Guard Bureau.

VI.

Plaintiff's final claim for relief is a common law action for defamation for which plaintiff requests this court to invoke pendant jurisdiction. Having dismissed all federal claims, this claim will also be dismissed.

VII.

Plaintiff is not without an alternative remedy.[3] Pursuant to its plenary authority, Congress has provided

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[3]Indeed, an alternative basis for dismissal of this action is plaintiff's failure to exhaust the administrative remedies available. See Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

systems for review and remedy of complaints by military personnel. One such system is the Air Force Board for Correction of Military Records (the "Board"). The Board has jurisdiction to correct the records of the Air National Guard of the United States if it finds that an error has been made or an injustice committed. 10 U.S.C. § 1552(a). Broad relief is available through this Board, including claims for lost pay, allowances, or other pecuniary benefits that may result from the correction of Air Force records. 10 U.S.C. § 1552(c) and (d). To provide plaintiff with additional relief would be contrary to Congressional intent and, thus, plaintiff's complaint is dismissed. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ULUS JORDEN, JR.,	:	CIVIL ACTION
v.	:	No. 85-0670
NATIONAL GUARD BUREAU, et al.	:	

O R D E R

AND NOW, this 24th day of SEPTEMBER, 1985, upon consideration of the motion of the Commonwealth defendants and the federal defendants to dismiss the complaint against them, the memoranda submitted by the parties, and for the reasons set forth in the accompanying memorandum, it is

ORDERED

that the defendants' motion to dismiss is GRANTED and the complaint is DISMISSED as to all defendants.

BY THE COURT

/s/ Joseph L. McGlynn, Jr.
JOSEPH L. McGLYNN, JR., J.

No. 86-1382

In the Supreme Court of the United States

OCTOBER TERM, 1986

GERALD SAJER, ET AL., PETITIONERS

v.

ULUS JORDEN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether members of the military are in all circumstances barred from equitable relief in federal court for alleged constitutional wrongs suffered in the course of military service.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-102a) is reported at 799 F.2d 99. The opinion and order of the district court (Pet. App. 103a-124a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1986, and a petition for rehearing was denied on October 23, 1986 (Pet. App. 1a-3a). On January 13, 1987, Justice Brennan extended the time

within which to file a petition for a writ of certiorari to and including February 20, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Ulus Jorden was a master sergeant in the Pennsylvania Air National Guard (PaANG). As a member of PaANG, he was also a member of the Air National Guard of the United States (ANGUS). The National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force, gives federal recognition to Guard members from individual states, including members of the Air National Guard. The President is empowered to call the Guard into national service. 10 U.S.C. 3495.

Besides being a military member of the Guard, Jorden was employed by the Guard as a full-time civilian technician. Although the technician program is wholly administered by the state, Jorden was considered a federal employee under the National Guard Technicians Act of 1968, 32 U.S.C. 709. In order to be eligible for a technician position, one must be a Guard military member. 32 U.S.C. 709(b).

In October 1984, the Governor of Pennsylvania issued an order calling Jorden to active duty for 23 days of "special training." Jorden was called up alone, without his unit. The order specified that he was to report to a medical center for psychiatric evaluation during the full 23-day period. Pet. App. 32a. Jorden refused to comply with the order, believing that the Governor was not empowered to call out a single guardsman for such a special session. Jorden

consequently was dismissed from his military position in PaANG. As a result, his employment as a technician and his membership in ANGUS were automatically terminated. *Ibid.*

Jorden subsequently filed this suit in the United States District Court for the Eastern District of Pennsylvania. He named as defendants the petitioners here—various of his military superiors in PaANG who were also his civilian supervisors—as well as respondent Emmett Walker, a federal official who was chief of the National Guard Bureau.[1] Jorden alleged that the defendants had engaged in a conspiracy to harass him and to discharge him on the basis of race and in retaliation for the exercise of his First Amendment rights. Jorden sought damages under the First and Fourteenth Amendments, under 42 U.S.C. 1983, 1985 and 1986 and under state tort law. He also sought reinstatement as a military member of PaANG and ANGUS and as a civilian technician.

2. The district court dismissed the entire suit, relying on this Court's decision in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court in *Chappell* held that a serviceman may not maintain a *Bivens* action for damages against his superior officers for

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[1] Although a co-defendant, Walker is a respondent here because he did not join in the petition for a writ of certiorari or file one on his own behalf. See Sup. Ct. R. 19.6. The National Guard Bureau (NGB) was also named as a defendant, but the court of appeals found (Pet. App. 34a-35a n.3) that Jorden had asserted no jurisdictional basis for the suit against NGB and therefore upheld the district court's dismissal of NGB as a defendant. Since that dismissal has not been challenged, NGB is no longer an interested party to these proceedings and Walker is the sole federal respondent.

alleged constitutional violations. The district court stated (Pet. App. 118a-119a) that the reasons underlying the *Chappell* decision—"the peculiar and special relationship between an enlisted man and his superiors, the effects on discipline by the maintenance of such suits, and Congress' use of its plenary authority over the military to establish a system of review and redress for the military"—applied with as much force to suits for injunctive relief as to suits for damages brought directly under the Constitution or under 42 U.S.C. 1983. The district court accordingly concluded that Jorden was restricted to avenues of redress provided by Congress within the military. "If the subordinate believes his superiors have conspired to violate his constitutional and civil rights," the district court stated, "he must attack their actions before military tribunals" (Pet. App. 120a).

3. The Third Circuit affirmed the dismissal of Jorden's damage claims as barred by *Chappell* but reversed the dismissal of his equitable claims for reinstatement. The court of appeals reasoned (Pet. App. 76a) that claims for reinstatement do not present the same "threat to vigorous decisionmaking" that is posed by claims for money damages. The court further noted (*id.* at 72a) that this Court has entertained numerous suits for injunctive relief by servicemen; indeed, the Court in *Chappell* cited several of these cases as examples of potential "redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304). The court of appeals therefore declined to adopt "a *per se* rule" (Pet. App. 68a) barring claims for equitable relief. Noting that Jorden's claims for reinstatement would not have required continuing oversight of the Guard of the sort precluded by *Gil-*

ligan v. *Morgan*, 413 U.S. 1 (1973), and that Jorden in all probability had no alternative forum for his claims (Pet. App. 36a-37a n.5),[2] the court of appeals reversed the dismissal of the equitable claims and remanded for further proceedings (*id.* at 80a-81a).[3]

ARGUMENT

Petitioners contend that, under this Court's decision in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), military servicemen are barred from all equitable relief in federal court for alleged constitutional violations. The decision below correctly rejects this extreme position and, in doing so, does not conflict with any decision of this Court or of any other court of

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[2] The court of appeals stated that its precedents favored exhaustion of military remedies, but did not require exhaustion "where the administrative remedy would be inadequate" (Pet. App. 36a-37a n.5). The court observed that Jorden had the possibility of securing some relief from the Air Force Board for the Correction of Military Records (AFBCMR) under 10 U.S.C. 1552, but concluded on balance that "the AFBCMR cannot afford [him] satisfactory relief." The court noted the defendants' concessions that "the AFBCMR, a federal Board, cannot order Jorden's reinstatement to the state Guard" and that "the AFBCMR is a military Board that is arguably not empowered to reinstate Jorden to his civilian technician position in any event." Pet. App. 37a n.5 (citation omitted). Finally, the court noted, "[n]either the district court nor defendants contend that there are adequate state remedies" (*ibid.*).

[3] Judge Gibbons dissented in part. He agreed with the majority that Jorden's suit for injunctive relief was proper, but argued (Pet. App. 84a-102a) that the logic of *Chappell* v. *Wallace* did not require that state military officials be immune from damage suits brought under 42 U.S.C. 1983. Since respondent Jorden has not filed a cross-petition (Sup. Ct. R. 20.5), that issue is not before the Court.

appeals. Accordingly, further review is not warranted in the present interlocutory posture of this case.

1. Petitioners' contention (Pet. 23-24) that all avenues to equitable relief in federal court are closed to members of the military is clearly untenable. As emphasized in *Chappell* v. *Wallace*, 462 U.S. at 304, "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." In our brief in *Van Drasek* v. *Webb*, No. 86-319 (petition for cert. dismissed as improvidently granted May 18, 1987), we explained that an aggrieved serviceman who has exhausted his military remedies has various means available to him to challenge in federal court the constitutionality of military decisions. For example, a serviceman claiming constitutional flaws in his conviction by a court-martial can—after appealing through several layers of intramilitary review, culminating in the Court of Military Appeals (10 U.S.C. (& Supp. III) 1552)—seek relief in federal court, either by petitioning for a writ of certiorari (10 U.S.C. (Supp. III) 867h) or seeking a writ of habeas corpus (*Burns* v. *Wilson*, 346 U.S. 137 (1953)).

Furthermore, the Boards for the Correction of Military Records, which are composed of civilians appointed by the Secretary of each branch of the armed forces, constitute broad avenues by which servicemen may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested each Secretary, acting through such a Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C.

1552(a)). In appropriate cases the Board may issue orders leading to reinstatement and an award of back pay (10 U.S.C. 1552(c)). Most significantly, as this Court recently noted, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. at 303. Thus, a serviceman alleging constitutional violations could well obtain some form of equitable relief in federal court upon review of a Board decision.

Finally, in a limited category of cases, this Court has permitted servicemen to challenge the constitutionality of prescribed military procedures directly, rather than indirectly by means of an attack upon a Board decision. See, *e.g.*, *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) (First Amendment challenge to Air Force regulation prohibiting servicemen from wearing headgear indoors while on duty); *Brown* v. *Glines*, 444 U.S. 348 (1980) (First Amendment challenge to Air Force regulation authorizing base commanders to regulate circulation of petitions); *Parker* v. *Levy*, 417 U.S. 733 (1974) (attack on provisions of Uniform Code of Military Justice as unconstitutionally vague); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (equal protection challenge to benefit plans for military women).

Petitioners correctly note (Pet. 29) that most of this Court's decisions permitting such immediate recourse to the federal courts have involved attacks by military personnel on the facial validity of statutes or regulations. On the other hand, where (as here) a serviceman does not seek to challenge the facial constitutionality of a statute or regulation, but rather seeks to challenge a discrete personnel decision or similar action by military authorities, exhaustion

of intraservice remedies has generally been required. Permitting a serviceman to bring such a claim directly to federal court—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond*, 395 U.S. 683, 696 (1969)): "If the military * * * do[es] vindicate [the serviceman's] claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

In this case, however, petitioners have apparently conceded (see Pet. App. 37a n.5) that there were no remedies within the Pennsylvania National Guard that Jorden could have been expected to exhaust. Moreover, although Jorden had sought federal intraservice relief by way of a petition to the AFBCMR, the court of appeals noted that there were serious doubts about the AFBCMR's ability to afford relief, inasmuch as Jorden sought reinstatement both to the *state* Guard and to his position as a *civilian* technician. See Pet. App. 36a-37a n.5; *Penagaricano* v. *Llenza*, 747 F.2d 55, 57 (1st Cir. 1984) ("the AFBCMR has no power to force a state to reinstate the officer in the state's Air National Guard"). Under these exceptional circumstances, we do not think that the court of appeals acted unreasonably in permitting Jorden to bring his constitutional claims directly to federal court. The absolute bar to such claims advocated by petitioners is not in keeping with

this Court's jurisprudence and has not been accepted by any court of appeals.[4]

2. Apart from their untenable theory that the federal courts are barred from affording equitable relief even where a serviceman has no other available remedies, petitioners have articulated no rationale that would support reversal of the judgment below. In view of the unique demands of military society, this Court has recognized that the types of claims servicemen should be permitted to bring to federal court must be narrowly defined.[5] In keeping with

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[4] The Fifth Circuit's decision in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (1986), on which petitioners rely, is not to the contrary. In that case, the court dismissed claims for equitable relief brought by members of the Texas Army National Guard who claimed retaliation in violation of their First and Fourteenth Amendment rights. The plaintiffs in *Crawford*, however, sought not only reinstatement in the Texas National Guard, but also "correction of their military records and reinstatement of eligibility for retirement benefits," matters peculiarly within the competence of the Army Board for the Correction of Military Records (794 F.2d at 1035, 1036). The court accordingly concluded that the plaintiffs had "failed to exhaust available service-connected remedies by appealing to the Army Board," and held that "[t]heir action on this basis should be dismissed pending the conclusion of such remedies" (*id.* at 1036). The court stated that suits for injunctive relief "must be carefully regulated in order to prevent intrusion of the courts into the military structure" (*id.* at 1037), but it did not purport to erect an absolute bar to such claims where no intraservice remedy exists. Rather, it dismissed the claims "without prejudice to the reviewability of any future actions taken by the Army Board for the Correction of Military Records" (*ibid.*).

[5] See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply the Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*,

this line of precedents, most courts of appeals have endorsed the analysis first stated by the Fifth Circuit in *Mindes* v. *Seaman*, 453 F.2d 197 (1971), for determining the reviewability of claims arising incident to military service.[6] Under the "*Mindes* test," a serviceman alleging a deprivation of a constitutional, statutory or regulatory right must first exhaust all available intraservice remedies (453 F.2d at 201). Once that is done, the court must determine the reviewability of his claims by weighing his particular

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345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975) (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, *supra* (holding that a serviceman may not bring a *Bivens* action seeking damages for alleged constitutional wrongs). These restrictions on the justiciability of claims raised by servicemen should of course apply whether the case is brought directly to federal court or indirectly as, for example, on review of the decision of a Corrections Board. Although Board decisions generally are reviewable (*Chappell* v. *Wallace*, 462 U.S. at 303), the mere fact that an otherwise nonjusticiable claim has first been passed on by a Corrections Board should not transform it into a justiciable claim.

[6] The so-called "*Mindes* test" has been followed, *e.g.*, in *Rucker* v. *Secretary of the Army*, 702 F.2d 966 (11th Cir. 1983); *Nieszner* v. *Mark*, 684 F.2d 562 (8th Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *Lindenau* v. *Alexander*, 663 F.2d 68 (10th Cir. 1981); *Schlanger* v. *United States*, 586 F.2d 667 (9th Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).

allegations against the "[t]raditional judicial trepidation over interfering with the military establishment" (*id.* at 199). The Third Circuit, unlike most other courts of appeals, has not adopted the "*Mindes* test." See Pet. App. 79a-80a n.16; *Dillard* v. *Brown*, 652 F.2d 316 (1981). As the panel correctly noted below, however, the claims advanced by respondent Jorden here "would likely be reviewable under a *Mindes* balance," since "[h]e alleges race discrimination and retaliation for the exercise of politically-related speech," and since he appears to lack any adequate remedies within the military (see Pet. App. 80a n.16). In all probability, therefore, the result in the instant case would be the same regardless of whether the *Mindes* test or the Third Circuit's somewhat different analysis were employed.

Petitioners do not challenge the court of appeals' statement that Jorden's claims for equitable relief would be justiciable under the *Mindes* test no less than under the analysis advanced by the court below. Indeed, petitioners do not even cite the *Mindes* case. Nor have they suggested any alternative analysis—aside from an unacceptable blanket ban on claims for equitable relief—under which Jorden's claims would be nonjusticiable. Thus, this case does not raise the question of the propriety of *Mindes* v. *Seaman*, *supra*, and petitioners have failed to articulate any satisfactory grounds for calling into question the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 86-1392

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

GERALD SAJER, MAJOR GENERAL (PA)
THE ADJUTANT GENERAL, COMMONWEALTH
OF PENNSYLVANIA, et al.,
Petitioners

v.

ULUS JORDEN, JR.,
Respondent

REPLY TO FEDERAL RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

I. A. In the petition for writ of certiorari, we demonstrate why the Court of Appeals' decision allowing any direct suit against military superiors for injunctive relief cannot be reconciled with either the specific holdings or rationale of this Court's cases, and conflicts with decisions of other Courts of Appeals. In opposition to the petition, the federal respondent[1] contends that we have adopted the "extreme

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[1]The Federal co-defendant Emmett Walker is a respondent here because he neither joined Sajer's petition nor filed one on his own behalf. (Resp. Br. at 3, n. 1). Respondent Jorden has not filed a brief in opposition to the petition, nor has he filed a cross-petition on his claim for damages.

position" (Resp. Br. at 5) that military service personnel are barred from all equitable relief in federal court for alleged constitutional violations, a view which they argue was properly rejected by the Court of Appeals. Respondents argue that under the "exceptional circumstances" of this case (Resp. Br. at 8), the Court of Appeals acted reasonably "in permitting Jorden to bring his constitutional claims directly in federal court" (id.), and that this case does not conflict with Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986) (Resp. Br. at 9, n. 4).

B. Respondent begins by arguing that petitioner advocates the "extreme" position that servicemen are

barred from obtaining any equitable relief in federal court. (Resp. Br. at 5). Initially, it must be noted that opposition to the Court of Appeals' determination that any injunctive action can be brought does not entail, either logically or legally, the corollary that no such action can be brought, and petitioners nowhere argue for this in their petition. Moreover, the issue in this case is direct action against military superiors, not those classes of cases which involve reviews of intra-military tribunals and boards or facial challenges to statutes or regulations. As respondent concedes, Resp. Br. at 7-8, this Court allows such direct challenges in only a "limited category of cases" involving facial attacks on military statutes or regulations, and that such claims as respondent Jorden

seeks to bring "would undermine the system of remedies established by Congress within the armed forces." In our view, these are the limits of permissible injunctive relief.

C. Respondent appears to argue that the Court of Appeals' decision is somehow sanctioned by the language in Chappell v. Wallace, 462 U.S. 296, 304 (1983) stating that "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." The Court of Appeals recognized that Chappell makes no direct references to claims for injunctive relief, (Pet. App. 69a) and that its decision was being made in the

absence of a decree from this Court. (Pet. App. 76a-77a). Nevertheless, the decision of the Court of Appeals is plainly incompatible with the decisions of this Court relating to suits against the military. Petitioner will not repeat the cases and argument in their original petition (Pet. at 24-30), but note that just this term, the doctrine of Feres v. United States, 340 U.S. 135 (1950) was reaffirmed by this Court in United States v. Johnson, No. 85-2039 (May 18, 1987). Specifically stated as a basis for the continuing vitality of that doctrine is the unique nature of the military, which "must foster instinctive obedience, unity, commitment and esprit de corps," and must have discipline which "involves not only obedience to orders, but more generally duty and

loyalty." Johnson, slip op. at 9-10. See also Goldman v. Weinberger, No. 84-1097 (March 25, 1986); United States v. Shearer, 473 U.S. 52 (1985); Parker v. Levy, 417 U.S. 733 (1974). It is clear that the continued vitality of Feres and the Feres rationale is incompatible with the decision of the Court of Appeals allowing any and every injunctive action to be brought against military superiors.

D. Respondent also mischaracterizes this case, and in so doing fails to perceive the true impact of the Court of Appeals' decision. The truly extreme position is that of the Court of Appeals, which would allow a direct action by military personnel against their superiors in federal court at any time, so long as those actions are labeled "injunctive"

rather than as claims for damages. As pointed out by petitioners, Pet. at 23-24, the distinction drawn by the Court of Appeals between damages actions and injunctive claims is wholly untenable, resting as it does on the proposition that damage awards present a threat to vigorous decision making and an intrusion into military discipline that injunctive actions do not. One need only consider the prospect of service personnel seeking temporary restraining orders or preliminary injunctions to block the enforcement of orders sending personnel into combat to realize that injunctive actions are in fact likely to be more, rather than less, intrusive.

E. Respondent does not address the wholly standardless nature of the Court of Appeals' decision or the unfounded distinction on which it is based.

Rather, he focuses on what he characterizes as the "exceptional" circumstances of this case, circumstances which are claimed to justify the Court of Appeals' decision. (Resp. Br. at 8).

Contrary to respondent's characterization, no "exceptional" circumstances are presented by this case, nor did the Court of Appeals take itself to be deciding a fact-specific case which would give rise to a narrow result.[2] In fact, this case is all too typical, a typicality which only serves to emphasize the sweeping nature of the Court of Appeals' decision. The fact that respondent Jorden seeks reinstatement to both

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[2]Indeed, in that this case was disposed of on a motion to dismiss in the trial court the only facts presented are those of the amended complaint which must be taken as true in the current procedural posture of this case.

the state guard and to his civilian technician employment, relief which the Air Force Board for the Correction of Military Records may not be able to order,[3] plainly constitutes the typical case for a member of a National Guard unit who holds dual federal and state status as well as his technician employment, and seeks injunctive relief after discharge. Moreover, this case arises from the most basic of military actions: the disciplining of a subordinate for failing to obey a facially valid

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[3]In this regard, the unstated assumption of the Court of Appeals that petitioners would not take the appropriate action to reinstate Jorden even if he were successful before the AFBCMR, simply because the Board cannot order such action, is unwarranted.

order given by a superior. There is simply nothing "exceptional" about the facts of this case.

What is exceptional is the legal analysis of the Court of Appeals, an analysis which allows military personnel to file an action seeking injunctive relief against their superiors, no matter how intrusive such an action would be, and regardless of whether any regulations are challenged or administrative remedies exhausted. Such a holding, arising in the context of so basic a military situation as that presented by this case, is of vital significance to every National Guard unit. Because it is both grounded on an untenable distinction between damages actions and claims for injunctive relief, and is inconsistent with the

specific holdings and overall intent of this Court's cases, this Court should grant the writ.

II. Respondent contends, Resp. Br. at 9, n. 4, that the decision in Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986) is not inconsistent with the decision of the Court of Appeals in this case. Respondents properly point out that plaintiffs in Crawford sought not only reinstatement in the TARNG, but also correction of their military records and eligibility for retirement benefits without any recourse to the Army Board, and that the Fifth Circuit dismissed the action pending exhaustion. Nevertheless, the Fifth Circuit refused to allow precisely the type of action permitted by the Court of Appeals in this case: a direct

action against military superiors seeking injunctive relief for actions taken by those superiors. What equitable relief the Fifth Circuit would allow was limited to a review "of any future actions taken by the Army Board." Crawford, 794 F.2d at 1037. This is a far more limited provision for injunctive relief than the standardless result in the present case. These cases are incompatable in that they sanction wholly different avenues of redress for service personnel. The federal nature of the National Guard, and the Guard's presence in every state, demands more consistency than these cases provide.

At a minimum, the decision of the Court of Appeals has rendered the intra-military system of review and remedies superfluous, and lacks even the

flexible standards of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) for regulating injunctive actions by military personnel.[4] Contrary to respondent, Rep. Br. at 11, there are more than adequate grounds for calling into question the Court of Appeals' decision, and sufficiently important issues to warrant this Court's consideration.

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[4]The respondent's characterization of the Third Circuit's standard as only "somewhat different" from the Mindes test fails to recognize that the decision of the Court of Appeals in this case has as its only "standard" whether the complaint is labeled as an injunctive action, and requires neither the exhaustion of intra-service remedies nor the analysis and balancing of factors required by Mindes.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and, upon review, the decision of the Court of Appeals should be reversed and judgment entered for petitioners on the claims for injunctive relief.

Respectfully submitted,

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